UNITED STATES BANKRUPTCY COURT
THE DISTRICT OF DELAWARE

In re:	:	
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FLEMING COMPANIES, INC., et al., [1]	:	**Case No. 03-10945 (MFW)**
	:	**(Jointly Administered)**
	:	**Chapter 11**
Debtors.	:	
	:	**Objection Deadline: July 14, 2003 at 4:00 p.m.**
	:	**Hearing Date: July 17, 2003 at 3:00 p.m.**

EMERGENCY MOTION TO COMPEL COMPLIANCE WITH
SECTIONS 365(d)(3) OF THE BANKRUPTCY CODE AND THE COURT'S ORDERS

DEC Investments LLC ("DEC") and Shield Investment Company ("Shield"), by and through their undersigned attorneys, respectfully request that the Court enter an Order requiring the Debtors to comply with Section 365(d)(3) of the Bankruptcy Code and the Court's Orders pending rejection of the leases described below (the "Motion"). In support of the Motion, DEC and Shield state as follows:

JURISDICTION

1. The Debtors filed for relief under Chapter 11 of the Bankruptcy Code on April 1, 2003.

2. The Debtors are debtors-in-possession under 11 U.S.C. §§ 1107 and 1108 of the Bankruptcy Code.

3. The Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (M), and (O).

4. The statutory basis for the relief requested in the Motion is 11 U.S.C. §§ 105 and 365.

[1] The Debtors are the following entities: Core-Mark International, Inc.; Fleming Companies, Inc.; ABCO Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; Dunigan Fuels, Inc.; Favar Concepts, Ltd.; Fleming Foods Management Co., L.L.C.; Fleming Foods of Texas, L.P.; Fleming International, Ltd.; Fleming Supermarkets of Florida, Inc.; Fleming Transportation Service, Inc.; Food 4 Less Beverage Company, Inc.; Fuelserv, Inc.; General Acceptance Corporation; Head Distributing Company; Marquise Ventures Company, Inc.; Minter-Weisman Co.; Piggly Wiggly Company; Progressive Realty, Inc.; Rainbow Food Group, Inc.; Retail Investments, Inc.; Retail Supermarkets, Inc.; RFS Marketing Services, Inc.; and Richmar Foods, Inc.

SUMMARY OF ARGUMENT

Pursuant to Section 365(d)(3) of the Bankruptcy Code, the Debtors have an obligation to timely perform all obligations that come due under the Leases described herein below from and after the Petition Date. The Debtors have failed to perform certain obligations pursuant to the Leases and various Court Orders, including:

- The Debtors have failed to pay rent due on July 1, 2003 in the amount of **$58,879.17**;
- The Debtors have failed to pay real estate taxes in the amount of **$171,903.23** when they came due on June 20, 2003;
- The Debtors further have failed to provide maintenance to the property post-petition, including the completion of the installation of a new roof which work was ongoing before and during the bankruptcy. Debtors failed to repair the roof where leaks have developed due to the cessation of work on the new roof;
- The Debtors have failed to restore the temperature at the property as required pursuant to the Stipulation between the parties described herein below;
- The Debtors have failed to transfer the ammonia (a hazardous material) from the cooling systems into sealed storage tanks and remove all excess ammonia from the premises;
- The Debtors have failed to properly remove and dispose of used forklift batteries (another hazardous material) from the premises;
- The Debtors have failed to "broom clean" the premises pursuant to the DoveBid Order; and
- The Debtors should be required to pay DEC and Shield's attorneys fees under the Leases in enforcing their rights in this Court.

The Debtors' have cavalierly disregarded the due process requirements of the Bankruptcy Code and the Bankruptcy Rules. The Debtors have flagrantly disregarded the Orders and directives of this Court, and the Debtors are attempting to unilaterally abrogate express statutory duties. This egregious conduct should not be rewarded, and the Debtors should be required to comply with their statutory and court ordered duties.

FACTS

A. The Leased Premises

1. The DEC Facilities – 5100 Building

5. On or about September 17, 1993, the Debtors entered into that certain Sublease Agreement (5100 Kansas Avenue) dated September 17, 1993 by and between and DEC Investments, L.L.C., as Sub-landlord, and Fleming Companies, Inc., as Sub-Tenant (the "5100 Lease"). A copy of the 5100 Lease is attached as Exhibit "A". Pursuant to the 5100 Lease, the Debtors agreed to sublease a warehouse located at 5100 Kansas Ave. (the "5100 Building").

6. The 5100 Building is a 79,560 square-foot warehouse space which was converted by Debtors into a special-purpose refrigerated warehouse.

7. Subsequent to the execution of the 5100 Lease, DEC obtained full ownership of the 5100 Building.

8. Pursuant to Section 4 of the 5100 Lease, the Debtors agreed to pay rent on the 1st day of each month in the amount equal to 1/12 of the applicable annual rental which is currently $16,837.50 per month. Additionally, pursuant to Section 8.1 of the 5100 Lease, the Debtors agreed to pay all taxes as and when due.[2]

9. Pursuant to Section 9.2.2 of the 5100 Lease, the Debtors further agreed to provide all maintenance to the 5100 Building.[3]

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[2] Section 8.1 of the 5100 Lease provides:

> 8.1 Impositions. ***Tenant shall***, during the Sublease Term, bear, ***pay*** and discharge, ***before the delinquency thereof, all taxes*** and assessments, general and special, if any, which may be taxed, charged, levied, assessed or imposed upon or against or be payable for or in respect of the Leased Premises, or any part thereof, or any improvements at any time thereon, or Tenant's interest in the Leased Premises, or on account of the leasing of all or parts thereof, including any new taxes and assessments not of the kind enumerated above to the extent that the same are made, levied or assessed in lieu of or in addition to taxes or assessments now customarily levied against real or personal property, and further including all water and sewer charges, assessments and other governmental charges and impositions whatsoever, foreseen or unforeseen, which if not paid when due would give rise to a lien on the Leased Premises (all of the foregoing being herein referred to as "Impositions"). * * * (Emphasis added.)

[3] Section 9.2.2 of the 5100 Lease provides:

> 9.2.2 Other Maintenance. Tenant shall maintain the Leased Premises and all appurtenances thereto, including, without limitation, all buildings, structures, roofs, doors, glass, parking lots and driveways,

2. The DEC Facilities – 5150 Building

10. On or about September 17, 1993, the Debtors entered into that certain Lease Agreement (5150 Kansas Avenue) dated September 17, 1993 by and between DEC Investments, L.L.C., as Landlord, and Fleming Companies, Inc., as Tenant (the "5150 Lease"), whereby the Debtors agreed to lease a warehouse located at 5150 Kansas Ave. (the "5150 Building"). A copy of the 5150 Lease is attached as Exhibit "B".

11. The 5150 Building is a 71,400 square-foot warehouse, a portion of which was converted by Debtors to office space.

12. Pursuant to Section 4 of the 5150 Lease, the Debtors agreed to pay rent on the 1st day of each month in the amount equal to 1/12 of the applicable annual rental which is currently $18,500 per month. Additionally, pursuant to Section 7.1 of the 5150 Lease, the Debtors agreed to pay all taxes as and when due.

13. Pursuant to Section 8.2.2 of the 5150 Lease, the Debtors further agreed to provide all maintenance to the 5150 Building.

14. Collectively, the 5100 Building and the 5150 Building will be hereinafter referred to as the "DEC Facilities".

2. The Shield Facilities

15. On or about September 17, 1993, the Debtors entered into that certain Sublease Agreement (5200 Kansas Avenue) dated September 17, 1993 by and between Shield Investment Company, as Sub-landlord, and Fleming Companies, Inc., as Sub-Tenant (the "5200 Lease") whereby the Debtors agreed to lease a warehouse located at 5200 Kansas Ave. (the "5200 Building"). A copy of the 5200 Lease is attached as Exhibit "C".

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fixtures, appliances and mechanical systems, at its sole cost and expense, in accordance with the requirements of the Lease and otherwise in good condition and repair, at least as good as existed on the Commencement Date (and with respect to any improvements hereafter made, upon the completion thereof), ordinary wear and tear excepted. Without limitation of the foregoing, Tenant shall keep the Leased Premises in a clean condition, free of visible trash or debris of any kind or any other material which may detract from the appearance of the Leased Premises.

16. The 5200 Building is a 95,900 square-foot warehouse which was converted by Debtors into a special-purpose refrigerated warehouse. Thereafter, Debtors constructed an addition to the 5200 Building adding 104,700 square-feet of warehouse space. The addition is dry warehouse space; it is not configured for refrigerated storage, and it is commonly known as 5250 Kansas Avenue (the "5250 Building").

17. Pursuant to Section 4 of the 5200 Lease, the Debtors agreed to pay rent on the 1st day of each month in the amount equal to 1/12 of the applicable annual rental which is currently $23,541.67 per month. Additionally, pursuant to Section 8.1 of the 5200 Lease, the Debtors agreed to pay all taxes as and when due.

18. Pursuant to Section 9.2.2 of the 5200 Lease, the Debtors further agreed to provide all maintenance to the 5200 Building.

19. Collectively, the 5200 Building and the 5250 Building will be hereinafter referred to as the "Shield Facilities").

3. The Roof

20. Prior to the commencement of the bankruptcy case, the Debtors undertook to install a new, insulated roof over the DEC Facilities and Shield Facilities. As of the Petition Date, the new roof was approximately two-thirds (2/3) complete. The Debtors continued to have the roofing contractor work post-petition through and including April 10, 2003 at which time the contractor attempted to seal the roof at the then-complete location and ceased further work on the roof.

21. During the second and third week of June, 2003, the Kansas City area experienced seasonal rain fall, and the roof of the DEC Facilities and Shield Facilities began leaking at the supposedly "sealed" seam between the new roof and the old roof.

B. Procedural Facts

22. On April 2, 2003, the Debtors filed a Motion for Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property and Aviation Equipment (Docket Item 13) (the "First Rejection Motion").

23. In the First Rejection Motion, the Debtors sought the Court's authorization to reject certain leases to be effective April 1, 2003. The Debtors scheduled a hearing on the First Rejection Motion on April 3, 2003.

24. At the hearings before the Court on April 3, 2003, counsel for the Debtors falsely represented to the Court that all of the properties subject to the First Rejection Motion were "dark," the Debtors had "little or no personal property" at the respective premises, and the Debtors had effectively surrendered the properties to the landlords.

25. Counsel for DEC and Shield also attended the "first-day" hearings and advised the Court that: (a) the Debtors still occupied the DEC and Shield properties; (b) the Debtors had employees engaged in ongoing operations at the DEC Facilities and the Shield Facilities; (c) the Debtors had substantial inventory at the location; and (d) the DEC Facilities and Shield Facilities included refrigerated warehouse space that was at a sub-zero temperature on the Petition Date.

26. The Debtors disputed these contentions at the "first-day" hearing on April 3, 2003, and the First Rejection Motion was continued to the Court's April 21, 2003 omnibus hearing calendar.

27. By letter dated April 9, 2003, counsel for DEC and Shield identified numerous issues to be addressed by the Debtors for a valid surrender and rejection of the Leases, including the proper restoration of the temperature of the warehouses from the sub-zero temperature existing as of the Petition Date to ambient temperature; restoration of access to the Shield Facilities; and the disposal of hazardous materials existing at the DEC Facilities and Shield Facilities. A copy of the April 9, 2003 letter is attached as Exhibit "D".

28. On April 14, 2003, DEC and Shield, through counsel, filed DEC Investments LLC's and Shield Investment Company's Limited Objection to Debtors' Motion for Order Pursuant to Section

365(a) of the Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property and Aviation Equipment (Docket Item 294).

29. On April 17, 2003, the Debtors filed two Emergency Motions for Modification of Motion for Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property and Aviation Equipment (Removal of Certain Leases from Motion) (Docket Items 430 and 431) (the "Removal Motions").

30. In the Removal Motions, the Debtors removed the Leases from the First Rejection Motion after further review of the facts.

31. On May 15, 2003, the Debtors filed an Application of Debtors for an Order (a) Authorizing the Employment and Retention of Dovebid, Inc. as Auctioneer for the Sale of Residual Assets, (b) Establishing an Expedited Procedure to Sell Residual Assets Pursuant to the Auction Agreement with DoveBid, Inc., and (c) Authorizing, But Not Requiring, the Sale of the Residual Assets (Docket Item 916) ("DoveBid Application").

32. Pursuant to the DoveBid Application, the Debtors proposed to conduct, among other things, an initial webcast auction at the DEC Facilities and the Shield Facilities.

33. On June 4, 2003, the Debtors, DEC and Shield, executed a Stipulation by and between Debtors, DEC Investments LLC and Shield Investment Company Resolving Limited Objection to Application of Debtors for an Order (a) Authorizing the Employment and Retention of DoveBid, Inc. as Auctioneer for the Sale of Residual Assets, (b) Establishing an Expedited Procedure to Sell Residual Assets Pursuant to the Auction Agreement with DoveBid, Inc. and (c) Authorizing, But Not Requiring, the Sale of the Residual Assets (Docket Item 315) (the "Stipulation").

34. Pursuant to the Stipulation, the Debtors agreed to, among other things, properly restore the ambient temperature of the DEC Facilities and Shield Facilities to 65º Fahrenheit. Stipulation at ¶ 14(c). Additionally, the Debtors agreed that they would not abandon "hazardous materials" to DEC or Shield. Stipulation at ¶14(j).

35. On June 4, 2003, the Court entered an Order (a) Authorizing the Employment and Retention of DoveBid, Inc. and AMH Corp. as Auctioneers for the Sale of Residual Assets, (b) Establishing and Expedited Procedure to Sell Residual Assets Pursuant to the Auction Agreement with DoveBid, Inc., and (c) Authorizing, But Not Requiring, the Sale of the Residual Assets (Docket Item 1359) (the "DoveBid Order"). The DoveBid Order approved the retention of DoveBid and the sale procedures for the webcast auction. Those procedures included, among other things, a requirement that any real property used in the auction be returned "broom clean."

36. By interlineation at the June 4, 2003 hearing, the Stipulation was made a part of the DoveBid Order.

37. On June 9, 2003, the Debtors filed the Motion for Order Pursuant to Section 365 of the Bankruptcy Code Authorizing and Approving Procedures for (i) the Assumption and Assignment and (ii) Rejection of Executory Contracts and Unexpired Leases of Nonresidential Real Property of the Debtors (Docket Item 1383) (the "Procedures Motion"), whereby the Debtors sought to replace the procedures of the Bankruptcy Code and Bankruptcy Rules with their own process. The Debtors' process involved the issuance of unilateral "surrender letters" with lease rejections effective on the date of such surrender letter.

38. On June 20, 2003, DEC and Shield filed DEC Investments LLC's And Shield Investment Company's Limited Objection To Debtors' Motion For Order Pursuant To Section 365 Of The Bankruptcy Code Authorizing And Approving Procedures For (i) The Assumption And Assignment And (ii) Rejection Of Executory Contracts And Unexpired Leases Of Nonresidential Real Property Of The Debtors (Docket Item 1595) (the "Procedures Objection").

39. DEC and Shield's Procedures Objection was one of 19 objections filed by landlords to the Procedures Motion. DEC and Shield raised concerns regarding the expedited and retroactive rejection of the Leases because of unique conditions at the DEC Facilities and Shield Facilities, including, among others things, access, temperature, hazardous materials, and fire code issues related to the interconnection of the facilities.

40. On June 25, 2003, the Court denied the Procedures Motion and directed the Debtors to comply with the due-process requirements under the Bankruptcy Code and Bankruptcy Rules. Specifically, the Court directed that the Debtors file appropriate motions to reject particular leases with the Court and provide proper notice to landlords before rejecting any particular lease. The Court further commented that the Debtors' Procedures Motion did nothing more than deprive the landlords of their due-process rights. The Court refused to cut corners for the Debtors in derogation of landlords' substantive rights.

C. Debtors' Attempted Unilateral Rejection of Leases

41. Two days after that hearing, on June 27, 2003 and despite the Court's earlier ruling, the Debtors chose to implement their own procedures notwithstanding the Court's ruling. Without Court approval and in flagrant disregard of the Court's June 25, 2003 ruling, the Debtors issued unilateral "surrender letters" purporting to terminate all of Debtors' obligations under the Leases (the "Rejection Letters"). Copies of the Rejection Letters are attached as Exhibits "E", "F" and "G". Specifically, the Debtors stated:

> As of the date of this letter [June 27, 2003], the Debtors have no further obligations under the Leases and any administrative rent claims shall cease accruing. As a courtesy to you, the Debtors have arranged for termination of all utilities, security and insurance relating to the leased premises effective as of July 4, 2003. If you wish to have utilities, security and/or insurance for the leased premised, you must make your own arrangements to have them in place.

Rejection Letters, ¶ 3.

42. On June 30, 2003, the Rejection Letters were received by DEC and Shield. Immediately upon receipt, DEC and Shield's property manager visited the DEC Facilities and Shield Facilities to determine the state of the properties based upon the assertions in the Rejection Letter.

43. DEC and Shield discovered that all personnel of the Debtors had apparently vacated the DEC Facilities and the Shield Facilities. DEC and Shield further discovered that the property had not been secured. There were several doors without locks, and all security services and personnel had left the premises. The telephone service had been disconnected which, among other things, disabled the alarm

system and the fire suppression system. The temperature had not been restored to 65º Fahrenheit as required, and the electrical service which runs the refrigeration system was to be turned off on July 4, 2003 (thereby disrupting the restoration of the temperature and disabling the compressors to remove the ammonia from the system into onsite storage tanks). Additionally, the Debtors had abandoned other hazardous materials on the property, including forklift batteries, and the properties had not been cleaned. Finally, DEC and Shield discovered that the Debtors had failed to repair the roof where it had commenced leaking several weeks earlier.

44. The Debtors failed to make their normal monthly rental payments due on July 1, 2003 in the aggregate amount of **$58,879.17**. Moreover, property taxes on the facility in the amount of **$171,903.23** came due and payable on June 20, 2003 which taxes have not been paid. Copies of the tax bills are attached as Group Exhibit "H". Interest and penalties are accruing daily for the unpaid taxes. DEC and Shield have made arrangements to pay the taxes directly without waiving their rights to pursue the Debtors pursuant to the Leases, the Bankruptcy Code and other applicable law. As such, the Debtors are now obligated to pay the taxes to DEC and Shield as required by the Leases.

45. Notwithstanding the Debtors' apparent abandonment of the premises, on July 2, 2003, two of the Debtors employees re-entered the property.

46. That same day on July 2, 2003, the Debtors filed a Motion For Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases of Non-Residential Real Property (July 2, 2003 Motion) (Docket Item 1817) (the "Second Rejection Motion"), whereby the Debtors seek to, among other things, reject the Leases. The hearing on the Second Rejection Motion is scheduled for July 17, 2003.

47. As a result of the Debtors' repeated attempts to abrogate DEC and Shield's substantive rights, DEC and Shield have incurred attorneys' fees and expenses to Husch & Eppenberger, LLC, through June 27, 2003, and to Buchanan Ingersoll, through April 22, 2003, in an amount in excess of

$61,000.[4] Copies of invoices redacting confidential information are attached as Group Exhibit "I" and incorporated by reference.

ARGUMENT

A. The Debtors Must Timely Perform Obligations Under the Leases Until Rejection

The Debtors have unilaterally and precipitously ceased performing their statutory obligations under the Bankruptcy Code. The Debtors' actions as to DEC and Shield are both an abrogation of an express statutory duty imposed by Section 365(d)(3) of the Bankruptcy Code and a flagrant disregard of the prior orders and directions of this Court.

The Leases are unexpired leases of nonresidential real property governed by Section 365 of the Bankruptcy Code. Pursuant to Section 365(d)(3), "[t]he Trustee shall timely perform all the obligations of the debtor…arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected…." 11 U.S.C. § 365(d)(3) (2003). The Debtors are debtors-in-possession and have the powers and the duties of a trustee under Section 1107 of the Bankruptcy Code. As such, the Debtors have an obligation to perform under the Leases pursuant to Section 365(d)(3) of the Bankruptcy Code.

The term "obligation" is not defined under the Bankruptcy Code, "and it is thus apparently used in its commonly understood sense." Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 268 F.3d 205, 209 (3rd Cir. 2001). As the Third Circuit stated in Centerpoint, "an obligation is something that one is legally required to perform under the terms of the lease and that such an obligation arises when one becomes legally obligated to perform." Id. Under this approach, this jurisdiction has adopted the "billing date" approach to lease obligations, including rent and taxes. See In re Valley Media, Inc., 290 B.R. 73, 75 (Bankr. D. Del. 2003) (J. Walsh) ("the debtor must pay all lease obligations as they come due….the debtor must now continue to perform all the obligations

[4] This amount includes fees incurred to Buchanan & Ingersoll through only April 22, 2003. DEC and Shield will supplement this amount to include the fees incurred to Buchanan Ingersoll from April 22, 2003, to the current date.

of its lease or make up its mind to reject it before some onerous payment comes due during the pre-rejection period.") (Citations and quotations omitted.)

In the present case, the Leases have not been assumed or rejected. Moreover, the Debtors have failed to perform several crucial obligations under the Leases:

1. Rent.

The Debtors have failed to pay July rent. Indeed, according to the Rejection Letters, the Debtors have boldly advised DEC and Shield of their intent not to pay or otherwise perform under the Leases. July rent came due and payable under the Leases on July 1, 2003. Although a motion to reject was filed on July 2, 2003, the Leases have not been assumed or rejected. The subsequent filing of the motion does not relieve the Debtors of their statutory obligations. In fact, the Debtors employees re-entered the premises on July 2, 2003, and the Debtors were still in possession at that time. Thus, the Debtors have an obligation under the Leases to pay the full contract rent in the amount of **$58,879.17** for July, even if the Court subsequently allows rejection at the hearing on July 17 because such obligations were due and owing on July 1.

2. Taxes.

The Debtors have failed to pay taxes as and when due. Each of the Leases requires the Debtors to pay all "Impositions" including taxes "before delinquency." See 5100 Lease at § 8.1; 5150 Lease at § 7.1; 5200 Lease at § 8.1. Here, the Debtors failed to pay the real estate taxes due on the DEC Facility and the Shield Facility for the second half of 2002 in the amount of **$171,903.23**. The taxes became delinquent after June 20, 2003, and thus were fully due and payable on June 20, 2003 pursuant to the Leases. DEC and Shield have made payment arrangements with the taxing authorities, and the Debtors have an obligation to pay DEC and Shield the amount of the taxes. As in Centerpoint and in Valley Media, the Debtors have an obligation to pay the full amount of the taxes as and when payable under the Leases. Such tax payment was due and payable "before delinquency" which was payable in the post-petition, pre-rejection time period. Thus, the Debtors should be required to pay to DEC and Shield the sum of

$171,903.23 plus any applicable interest or penalty resulting from the Debtors' failure to comply with the Leases.

3. Maintenance.

The Debtors have failed to provide necessary maintenance to the real property, which is an obligation that arose post-petition. Each of the Leases contains a maintenance obligation. See 5100 Lease at § 9.2.2; 5150 Lease at § 8.2.2; 5200 Lease at § 9.2.2. Specifically, the Debtors undertook to install a new roof on the properties. Although the work commenced pre-petition, the Debtors ***continued*** to have work performed on the roof ***post-petition***. As the work was performed post-petition, the failure to complete the work post-petition constitutes a failure to perform post-petition maintenance. The estimated cost to complete the roof is **$98,000.00**. A copy of the estimate is attached as Exhibit "J". Moreover, the Debtors' conduct in ceasing work has caused the roof to leak. The leaks began post-petition along the seam where the roofing work was discontinued. At minimum, the Debtors should be required to repair the leaking roof and obtain an appropriate warranty for the work.

In addition to the roofing issue, the maintenance requirements of the Leases also require the Debtors to keep the premises clean. Similarly, the DoveBid Order requires the Debtors and/or DoveBid to "broom clean" the premises after the auction. On June 30, 2003, the properties were not "broom clean". DEC and Shield have obtained a bid of **$8,000.00** to have the premises cleaned. The Debtors should be required to reimburse DEC and Shield for this expense.

4. Temperature.

The Debtors have failed to restore the temperature at the property, and their actions in terminating utility service has disrupted the temperature restoration plan ordered by the Court as a part of the DoveBid Order. The Debtors agreed to restore the temperature to 65° Fahrenheit at a rate of 2° F per day, not to exceed 10° F per week. Upon restoration of the temperature, the Debtors agreed to pump the ammonia from the refrigeration system into approved on-site storage containers in compliance with applicable environmental laws. All excess ammonia was to be removed from the property. As of June 30, 2003, the temperature was still in the 50s, not the required 65° F. Termination of the electrical

services will turn-off of the refrigeration system. It will also cut power to the ammonia pumps preventing the transfer of the ammonia to the approved storage tanks. The Debtors' obligation to restore the temperature is a post-petition obligation as memorialized in the Stipulation and ordered in the DoveBid Order. It should strictly be enforced. Further, the Debtors should be required to pay the cost of any damages occasioned by their failure to restore the temperature properly.

5. Hazardous Materials.

The Debtors have failed to remove "hazardous materials" from the properties. Each of the Leases contains a requirement to remove hazardous materials within 10 days of a request of the Landlord. See 5100 Lease at §25.5, 5150 Lease at §24.5, and 5200 Lease at §25.5. At the time of the DoveBid auction, DEC and Shield became aware of used forklift batteries and excess ammonia (discussed above) on the premises and demanded the removal of such "hazardous materials." Instead, the Debtors have stated in the Rejection Letters their intent to abandon these "hazardous materials" to DEC and Shield. The Debtors actions violate the provisions of the terms of the Leases. Moreover, pursuant to the DoveBid Order, the Debtors expressly agreed not to abandon "hazardous materials" to DEC and Shield pursuant to the DoveBid Stipulation approved by the Court. See Stipulation at ¶ 14(j). Such action is also prohibited by the Supreme Court. See Midlantic Nat'l Bank v. New Jersey Dep't. of Env't Protection, 474 U.S. 494, 505 (1986) (holding that, without court approval, a bankruptcy trustee may not abandon property in contravention of some regulation is reasonably designed to protect health or safety from identified hazards). Consequently, the Debtors should be required to remove and dispose of such hazardous materials, and, to pay the cost of any damages occasioned by, inter alia, their unauthorized and unlawful abandonment.

6. Attorneys Fees.

Pursuant to the Leases, DEC and Shield are entitled to a reimbursement of costs and expenses, including attorneys' fees for "effecting compliance" with the Leases.[5] By this pleading, DEC and Shield

[5] Section 24.4 of the 5100 Lease and the 5200 Lease and Section 23.4 of the 5150 Lease (noted in brackets) provide:

demand reimbursement of all fees and expenses incurred in obtaining compliance with the Leases, Section 365(d)(3) of the Bankruptcy Code, this Court's DoveBid Order and the stipulation.

Section 365(d)(3) requires that a trustee "perform *all* obligations" arising under a lease of non-residential real property. 11 U.S.C. § 365(d)(3) (emphasis added). "By its own language, the Section is not limited to the obligation to pay rent." In re Cukierman, 265 F.3d 846, 851 (9th Cir. 2001). It includes the obligation to pay attorneys' fees incurred to enforce the landlord's rights in the bankruptcy proceeding prior to the rejection or assumption of the lease. See, e.g., Id. at 852; In re Exchange Resources, Inc., 214 B.R. 366 (Bankr. D. Minn. 1997) ("…as long as the underlying lease gives a landlord the right to recover its attorney fees upon breach by a tenant-debtor, the landlord can recover the legal fees it incurs to enforce the debtor's timely performance under §365(d)." (citations omitted)). This Court similarly has held that under Section 365(b)(1) a lessor's attorneys' fees may be recovered as a cure expense at the time of the assumption of a lease where the underlying lease provides for the payment of the attorneys' fees and expenses, and the fees and expenses are reasonable. In re Crown Books Corp., 269 B.R. 12, 15 (Bankr. D. Del. 2001). The same result should apply under Section 365(d)(3).

Consequently, DEC and Shield are entitled to recover their attorneys fees incurred in enforcing the Leases against the Debtors until such Leases are validly rejected. DEC and Shield suggest that these Debtors have repeatedly and egregiously attempted to thwart DEC and Shield's rights under the Bankruptcy Code. The Debtors' wrongful conduct began at the first-day hearings where the Debtors falsely represented to the Court that these properties were "dark" and should be rejected. But for DEC and Shield's counsel, the Court would have been misinformed and the Debtors would have been authorized to disregard their statutory duties. Thereafter, DEC and Shield have been required to enforce their rights under the Leases when the Debtors scheduled the DoveBid auction at the DEC Facility and the Shield Facility. The Debtors' proposed actions in the DoveBid Motion were in violation of the Debtors' duties under the Leases including, inter alia, damage to the property, disruption of the

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Tenant agrees to reimburse Landlord on demand for any expense with Landlord may incur in effecting compliance with this Sublease[Lease] on behalf of Tenant including court costs and attorneys' fees.

temperature and the abandonment of hazardous materials. DEC and Shield again were required to take legal action when the Debtors proposed rejection procedures contrary to the requirements of the Bankruptcy Code. Now, despite the Court's Orders, the Debtors have unilaterally abrogated their statutory obligations, yet again causing DEC and Shield to incur attorneys' fees to defend their rights under the Leases. In each instance, DEC and Shield were required to ask the Court to require the Debtors to comply with their statutory obligations. As such, DEC and Shield are entitled to their attorneys' fees incurred in this Chapter 11 action. While the total fees are not yet known, the fees and expenses incurred to Husch & Eppenberger, through June 27, 2003, and the fees and expenses incurred to Buchanan Ingersoll, through April 22, 2003, were in the total amount of $60,903.70,[6] and DEC and Shield estimate that an additional $12,500.00 in fees and $4,500.00 of expenses will be incurred in the prosecution of this motion. DEC and Shield request that the Court enter an Order which requires the Debtors to pay such charges.

B. <u>The Debtors Are Still in Possession of Both the DEC Facility and the Shield Facility</u>

The Debtors assert in the Rejection Letters that they have "surrendered" the DEC Facility and the Shield Facility to DEC and Shield. The statements contained in the Rejection Letter are simply not consistent with the objective facts. While the Debtors represent that they have vacated the premises, the Debtors' employees re-entered the premises on July 2, 2003 and used the premises for the benefit of the Debtors. As such, the Debtors still possess the property. Consequently, the Debtors must continue to timely perform notwithstanding their subjective, self-serving statements in the Rejection Letters.

As a consequence, the Debtors should not be rewarded for their dilatory conduct in this case, and their continued pattern of abuse to the rights of landlords, including DEC and Shield. As DEC and Shield have repeatedly advised the Court and the Debtors, the DEC Facility and the Shield Facility present certain factual circumstances that require the Debtors to specifically address issues and conditions on the premises. The Debtors' actions fly in the face of their statutory duties and reflect an attitude of disdain

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[6] As noted, this amount includes fees incurred to Buchanan & Ingersoll through only April 22, 2003. DEC and Shield will supplement this amount to include the fees incurred to Buchanan Ingersoll from April 22, 2003, to the current date.

for due process, the rules of conduct and the opinions of this Court. The Court should enter and strictly enforce the Debtors' statutory duties.

RELIEF REQUESTED

WHEREFORE, DEC and Shield respectfully request that the Court enter an Order substantially in the form annexed hereto: (a) requiring the Debtors to comply with 11 U.S.C. § 365 (d)(3) of the Bankruptcy Code, including but not limited to (i) payment of July rent to DEC and Shield in the amount of **$58,879.17** and continuing each month until the DEC Facility and the Shield Facility have been validly surrendered; (ii) payment of taxes to DEC and Shield in the amount of **$171,903.23** plus applicable penalties and interest; (iii) completion of the installation of the new roof or, in the alternative, repair of all seams and the purchase of applicable warranties for such repair work; (iv) removal of all "hazardous materials" from the property; (v) due and proper restoration of the temperature and payment of all utilities until such restoration has been effectuated; and (vi) payment to DEC and Shield of all attorneys' fees and expenses incurred in this Bankruptcy proceeding to Husch & Eppenberger through June 27, 2003, and to Buchanan Ingersoll through April 22, 2003, in the appropriate aggregate amount of $60,903.70[7] plus all additional fees and expenses incurred through resolution of this dispute, currently estimated to likely be the aggregate amount of **$12,500.00** in fees and expenses of **$4,500.00** subject to

[7] As noted, this amount includes fees incurred to Buchanan & Ingersoll through only April 22, 2003. DEC and Shield will supplement this amount to include the fees incurred to Buchanan Ingersoll from April 22, 2003, to the current date.

"true up"; and (b) for such further and other relief as the Court may deem just and proper.

Wilmington, Delaware
Dated: July 8, 2003

Respectfully submitted,

BUCHANAN INGERSOLL
PROFESSIONAL CORPORATION

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