

**In The Matter Of:**

*In Re: Fleming Companies, Inc.*

---

*August 26, 2003*

---

*Hawkins Reporting Service  
715 N. King Street, Suite 3  
Wilmington, DE 19801  
(302) 658-6697 FAX: (302) 658-8418*

Original File 082603FC.V1, 345 Pages  
Min-U-Script® File ID: 3082206274

**Word Index included with this Min-U-Script®**

Page 1

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWAREIn re: ) Chapter 11  
) Case No. 03 10945 (MTW)  
) Jointly AdministeredFleming Companies, Inc., et  
al, )  
) Debtors.Tuesday, August 26, 2003  
Courtroom 2A  
844 King Street  
Wilmington, Delaware

BEFORE: THE HONORABLE MARY W. WALSH, U.S. Bankruptcy Court Judge

## APPEARANCES:

PACHULSKI, STANG, ZIEHL, YOUNG, JONES &  
WEINTRAUB

BY: CHRISTOPHER J. LHULIER, ESQ.

BY: ROBERT ORGEL, ESQ.

BY: STEVEN G. FRYE, ESQ.

Counsel for the Debtors

PEPPER HAMILTON, LLP

BY: DAVID FOURNIEH, ESQ.

and

MILBANK, TWEED, ADLEY &amp; McCLOY, LLP

BY: LENA MANDEL, ESQ.

Counsel for the Creditors Committee

by landlord Bernard Wolfe. The Debtors have [9] reached a resolution with Mr. Wolfe. And so that [10] won't be going forward today.

[11] We're going to submit a stipulation [12] under certification of counsel hopefully soon [13] after the hearing today.

[14] THE COURT: All right.

[15] MR. LHULIER: Your Honor, Number 2, [16] has also been — I'm sorry, letter B under [17] Responses Received, the response of creditor Bent [18] Tree Shopping Center has also been resolved. We [19] do have a stipulation today that deals with their [20] objection, which establishes the effective date [21] for the rejection of their lease, and deals with a [22] few other issues involving certain underground [23] storage tanks.

[24] All right. The Committee has

[17] And the Debtor will pay one week's [18] prorated rent for August for occupancy. And as [19] well that a real property tax claim of DDB Limited [20] will be reserved. And they'll assert it however [21] they want to assert it hereafter.

[22] THE COURT: All right.

[23] MR. FRANCELLE: Thomas Francella on [24] behalf of DDB limited partnership. That is a

Page 2

[1] correct recitation of the agreement.

[2] THE COURT: All right. Thank you. [3] And you'll submit that under [4] certification.

[5] MR. ORGEL: We will.

[6] MR. FRANCELLE: Yes, Your Honor.

[7] MR. ORGEL: Your Honor, as you may [8] know, the — in fact, as you do know much better [9] than I, there were over a thousand real property [10] leases that were dealt with. I believe most of [11] them have been resolved.

[12] We've resolved three more this [13] morning. There is one remaining, and that's the [14] dispute with DEC Investments and Shield [15] Investments.

[16] THE COURT: Can you give me an idea [17] of how many witnesses, if any, we have?

[18] MR. SHALK: If it please the Court, [19] Your Honor, Mark Benedict appears for DEC [20] Investments, LLC, and Shield Investment Company. [21] Also in the courtroom with me are Selinda Melnik, [22] our local counsel, and John Malinee, a [23] representative of the property management [24] company.

Page 3

[1] We have and anticipate two [2] witnesses, and we have portions of a deposition [3] transcript to read into the record with respect to [4] the roof issues.

[5] THE COURT: Okay. And how many for [6] the Debtors?

[7] MR. ORGEL: We have one witness, [8] Your Honor.

[9] THE COURT: All right.

[10] MR. ORGEL: Your Honor, I would [11] note, though, that I think much of the testimony [12] in this matter will go to matters that the Debtors [13] believe involve a prepetition unsecured claim. So [14] I do think some argument first on what's — based [15] on the stipulated facts, we do have, I think, a [16] stipulation to present to Your Honor regarding [17] certain facts.

[18] THE COURT: Well, maybe you better [19] give me the stipulation.

[20] MR. ORGEL: I think that's a good [21] idea. Your Honor, right now I don't have a copy [22] other than with holes in them.

Page 2

## APPEARANCES CONTINUED:

BUCHANAN INGERSOLL

BY: SELINDA A. MELNIK, ESQ.

and

HUSCH &amp; EPPENBERGER, LLC

BY: MARK T. BENEDICT, ESQ.

Counsel for Shield Investments &amp; DEC Investments

Page 3

[1] THE CLERK: Please rise. You may be [2] seated.

[3] MR. LHULIER: Good morning, Your [4] Honor. Christopher Lhulier of Pachulski, Stang, [5] Ziehl, Young, Jones & Weintraub for the Debtors, [6] Your Honor. I'm joined today, Your Honor, by [7] Robert Orgel and Steven Frye of Pachulski Stang's [8] Los Angeles office.

[9] As a housekeeping matter, Your [10] Honor, we did file a pro hac vice motion for [11] Mr. Frye and Mr. Orgel yesterday.

[12] THE COURT: All right. They will [13] be granted.

[14] MR. LHULIER: Thank you, Your [15] Honor.

[16] Does Your Honor have a copy of the [17] amended notice of agenda that was filed yesterday [18] afternoon?

[19] THE COURT: I do.

[20] MR. LHULIER: Okay. Your Honor, on [21] the amended agenda, the first matter is the [22] Debtors' motion to reject certain unexpired leases [23] of non-residential real property. It was filed on [24] July 2nd.

Page 4

[1] The Court's entered a general order [2] on this matter. And there are certain matters [3] that were put over to today that are scheduled to [4] go forward.

[5] Your Honor, on Page 2 of the amended [6] notice of agenda under responses received A, under [7] Responses Received A, Your Honor, is the objection [8]

[1] reviewed that stipulation, and they consent to its [2] entry.

[3] THE COURT: All right. You may [4] hand that up.

[5] MR. LHULIER: Thank you, Your [6] Honor.

[7] May I approach?

[8] THE COURT: Yes. All right, then. [9] I'll enter the order as to the [10] restoration.

[11] MR. LHULIER: Thank you, Your [12] Honor. Your Honor, letter C under Responses [13] Received is the objection by DEC and Shield. If [14] Your Honor agrees, we think that makes sense to [15] deal with that as part of number two on the [16] agenda.

[17] THE COURT: Yes.

[18] MR. LHULIER: And Sub D under [19] Responses Received is the response of DDB, we have [20] reached a resolution of that matter. And [21] Mr. Orgel is going to present that matter as well [22] as the DEC and Shield matter.

[23] THE COURT: All right.

[24] MR. LHULIER: Thank you.

Page 5

[1] MR. ORGEL: Good morning, Your [2] Honor. Your Honor, while we are a hard working [3] law firm, we do let Mr. Stang take an occasional [4] vacation. He's on one now. That's why I'm here [5] instead. [6] Your Honor, as to the DDB Limited [7] matter, we did reach a stipulation. If I could [8] read it on the record, we'll submit something [9] after.

[10] But I believe counsel for DDB is [11] here in the Court and can confirm this. The [12] stipulation is that the effective date of the [13] rejection will be July 17, 2003, that the Debtor [14] will agree to pay under 365D3, \$3,000 for certain [15] architectural plans. That it was unable to turn [16] over.

[23] THE COURT: It's fine.

[24] MR. ORGEL: I'll just show you

Page 9

[1] this.

[4] MR. BENEDICT: I have one. Thank [3] you.

[4] THE COURT: Just hand it to my [5] clerk.

[6] MR. ORGEL: Sure, Your Honor, —

[7] THE COURT: All right, I've read [8] the stipulation.

[9] MR. ORGEL: Your Honor, thank you, [10] As well, I believe I don't think there's any [11] dispute that July's rent was paid.

[12] MR. BENEDICT: Your Honor, if it [13] please the Court, we did, in fact, receive July [14] rent. However, July utilities were not paid.

[15] MR. ORGEL: Okay, [16] Your Honor, as well I think matter [17] of record is the proceedings, the motion that this [18] Court — the motion was filed July 2nd by the [19] Debtors to reject this lease. There was a hearing [20] July 17th from which this was continued.

[21] The Debtors having vacated and left [22] the premises by July 31, Debtors believe that the [23] issue of rejection maybe can be addressed right [24] now. And that with rejection out of the way,

Page 10

[1] we'll find that some of these other issues fall [2] away.

[3] Other issues that we'll be [4] discussing that are being raised are requests for [5] reimbursement for things I term surrender [6] obligations, obligations to restore the premises [7] to its original condition it was in at the time of [8] leasing, to recut the curb, move the driveways, to [9] install fire walls, and or deconstruct certain [10] improvements made prior to the filing.

[11] I think some of those issues and the [12] facts that go with them fall away once we have [13] some discussion of the relevant legal issues. And [14] if we could do that, I think that will be a much [15] more efficient way to conduct this hearing, if [16] those are part of a general prepetition claim.

[17] THE COURT: Well, I understand your [18] argument that it's a rejection, but I understand [19] their argument is that you're not surrendering the [20] premises in the same condition. And it's not a [21] broom clean issue.

[22] It's —

[23] MR. ORGEL: Accepting that, Your [24] Honor, accepting that that's their argument, what

Page 11

[1] I'm saying is given their — assuming

they're [2] correct, —

[3] THE COURT: Mm-hmm.

[4] MR. ORGEL: — I still believe has [5] what we'll get to, is that the law does not make [6] surrendering the manner they're describing a [7] condition to rejection.

[8] THE COURT: All right. Why in —

[9] MR. ORGEL: Well, there is [10] controlling authority in this for this Court, the [11] Chatlos case, Judge Robinson decided —

[12] THE COURT: What's the name of the [13] Chatlos, C-H-A-T-L-O-S. The Chatlos case, Chatlos [14] Systems versus Caplan.

[15] THE COURT: Yes.

[16] MR. ORGEL: In that case, there was [17] a subtenant. The rejection occurred supposedly, [18] but surrender couldn't occur because there was a [19] subtenant. And the landlord came in for [20] administrative rent, which was granted.

[21] The District Court reversed saying [22] surrender is not a condition to rejection. And [23] the case was remanded. On remand, the Court held [24] in another published decision, in, again, Chatlos

Page 12

[1] versus Caplan, that the administrative rent claim [2] was denied. And there was — Court claims grew [3] from other claims. They were all addressed in the [4] remanded cases, all prepetition unsecured claims.

[5] As well, Your Honor, there's a how [6] authority out of can social security, Kansas [7] lease. So I guess that's an appropriate it in, In [8] Re: Duckwall, which is an 150 BR 965. That notes [9] that the surrender language in the bankruptcy code [10] preempts any notion of state law surrender, which [11] is — and that Court really addressed very similar [12] issues and found that, and I'll quote. It's a [13] brief quote.

[14] Contrary to Inland's contention [15] Duckwall's rejection of the unexpired lease was [16] not conditioned upon Inland's acceptance of the [17] premises. Rather the language of the code [18] envisions a unilateral decision on the part of the [19] trustee, or Debtor-in-possession whether to reject [20] or assume the unexpired lease, subject only to the [21] Court's approval upon rejection, Section 365D4 [22] requires the trustee or Debtor-in-possession [23] immediately surrender the property to the lessor.

[24] The code does not require the lessor

Page 13

[1] to accept the premises in return before rejection [2] is deemed effective. And discussion there over [3] state law requirements for acceptance as part of

[4] surrenders, the Court said that's just not part of [5] the bankruptcy code.

[6] THE COURT: But the question is: [7] Can the Debtor surrender the premises?

[8] MR. ORGEL: Well, I think it [9] goes —

[10] THE COURT: What does that mean?

[11] MR. ORGEL: That's right, Your [12] Honor. But I think the argument that surrender [13] means that you have to comply with either state [14] law or with the lease in terms of what surrender [15] means restore the premises to the original [16] condition proves too much. 365(d)4, which [17] contains the surrender language by its term says [18] it applies to all chapters of the Bankruptcy Code, [19] Chapter 7, Chapter 11.

[20] THE COURT: I know.

[21] MR. ORGEL: As a result of that, [22] the Chapter 7 trustee could never reject a lease [23] like this. Day one, Chapter 7 trustee had already [24] vacated. He couldn't reject because he'd have an

Page 14

[1] obligation, I'll surrender, which would be the [2] issue on surrender to restore the premises.

[3] So a Chapter 7 trustee with limited [4] resources would have to file it as a no asset [5] case, or would have to pay, would have to expend [6] whatever money there was to restore the premises [7] leaving nothing for the rest of the [8] administration. I don't think that's the [9] intention of the code.

[10] THE COURT: Clearly, this is not [11] the first case. Do you have any cases dealing [12] with landlords argument that you have to restore [13] the premises incur construction costs surely this [14] can't be the first case.

[15] MR. ORGEL: I think the — in fact, [16] we didn't find any — I will say that there was a [17] late reply, a sir replay filed which cites a case [18] to the contrary, a case where the Court said — [19] but the Court was interested — it said it was an [20] equitable matter and said, out of equity, the [21] Court would not allow rejection without surrender [22] to include certain provisions of the lease.

[23] However, interestingly, those [24] provisions required — what the Court said was it

Page 15

[1] was garbage and debris on the premises, and those [2] conditions of the lease said it had to be left in [3] broom clean condition.

[4] Your Honor, this Court imposes that [5] kind of reasonable requirement all the time. And [6] that quid pro quo is actually something this Court [7] generally insists on in order to conduct an [8] auction of the premises. That's what happened [9]

here.

[10] We've agreed to that. We agreed to [11] other things, and we did it. They're going much [12] further.

[13] **THE COURT:** Well, they're going [14] much further because of the acts of Debtor [15] prepetition in altering their property, so that [16] they cannot relet it without these changes. They [17] cannot use their own property without these [18] changes.

[19] **MR. ORGEL:** I understand, Your [20] Honor, but I don't see how it would be different [21] for a Chapter 7 trustee. I just don't see any [22] difference.

[23] If the same thing happened and this [24] case were filed as a Chapter 7 on day one, they'd

Page 16

[1] be in the same boat. They'd be stuck with a [2] potential rejection.

[3] Your Honor, this is going to happen [4] at the end of September when we're going to have a [5] deemed rejection regardless. So the only real — [6] the issue here isn't whether they're going to [7] reject the lease. The issue is how much [8] administrative rent do we pay? How much of [9] administrative claims do we pay?

[10] They're not arguing it's a bad [11] business judgment to get out of this premises. [12] They are not disputing that the Debtors' business [13] judgment, that it's in the best interest of the [14] estate to get out. They're saying it's not fair [15] to them.

[16] **THE COURT:** Well, talk about the [17] roof repair, which is a different issue from the [18] access issue.

[19] **MR. ORGEL:** Your Honor, I agree. [20] The roof repair is a different issue. I think [21] repair and maintenance is a much tougher question, [22] because I think there's certain repair and [23] maintenance obligations that don't fall under a [24] surrender obligation.

Page 17

[1] They fall under 365(d)3, which is an [2] appropriate place to discuss continuing [3] pay-as-you-go obligations of the Debtor, and the [4] Debtor trustee, or Debtor-in-possession. Repair [5] and maintenance is an obligation that the Debtor [6] has.

[7] The question here is — the tough [8] question that's going to come up with repair and [9] maintenance, that's much tougher than a rent.

[10] **THE COURT:** And isn't that a [11] factual issue that I have to hear testimony on?

[12] **MR. ORGEL:** You may have to hear [13] some facts on, but I think what I hoped to say was [14] this will narrow it a

lot, I do think — you may [15] not.

[16] The difference here is that under [17] 365(d)3, and under the other obligations, [18] pay-as-you-go obligations, some of them are set [19] like rent first of the month, easy, and the Court [20] is going back and forth. I know this Court's [21] position on what happens if the bankruptcy is [22] filed on the 2nd, not the 1st. We all know that.

[23] When do you replace a roof? When [24] does that obligation arise, the 1st or the 2nd?

Page 18

[1] Much harder question.

[2] But if you —

[3] **THE COURT:** You stipulated it [4] started leaking June 26th. There's a postpetition [5] leak.

[6] **MR. ORGEL:** Yeah. No question, [7] Your Honor.

[8] But we also stipulated that prior to [9] April 1st, we began replacing the roof. The place [10] it leaked was where they tied off the old and new [11] roof.

[12] **THE COURT:** Right.

[13] **MR. ORGEL:** We're not saying we've [14] offered — I don't think there's any question [15] we've offered to repair the tied off, so it [16] doesn't leak. I don't think that's what's at [17] issue.

[18] I think there's going to be evidence [19] to the effect that that may — the landlord may [20] view that's worse or at least view that there's [21] evidence that will make a permanent replacement of [22] the roof, worse not better. And thus, there's [23] some testimony that the — I think you'll find [24] that the roofer said he'd do it.

Page 19

[1] But it wasn't clear that anyone [2] wanted the roof — were going to do it. So if [3] that's what we're being asked to do, we think the [4] roof will do that for free, replace, repair the [5] tie off. But we think the landlord wants more.

[6] The landlord wants replacement of [7] the roof. They want the 98,000 that's set in [8] escrow that would cover the entire replacement of [9] the roof on the 5150 portion of the building.

[10] And what we're saying, Your Honor, [11] is because it's absolutely clear since it was [12] started prepetition that the obligation of [13] prepetition. And the fact of a prepetition he [14] bankruptcy should convert that into a [15] postpetition claim.

[16] There's — it was already an [17] obligation existing on the date of the filing that [18] had come to fruition. We acknowledged we started [19] repairing the roof.

[20] So we do think as a matter of law [21]

that the — that if they want to put on evidence, [22] and if both sides want to put on evidence as to [23] the cost of the repair from — to bring it to the [24] position it was on April 1st, the cost of the

Page 20

[1] repair to tie off and make semi-permanent the tie [2] off between the old and new roof, we're fine to do [3] that. But I don't think that's where this [4] testimony was going to go.

[5] And I think we'd spend a lot of time [6] on issues relating to — that just don't relate [7] to —

[8] **THE COURT:** Well, the question [9] now — the question is whether the obligation to [10] repair means a patch job or to fix the problem.

[11] **MR. ORGEL:** I think you're right. [12] But it also means when did it arise?

[13] So if —

[14] **THE COURT:** Well, postpetition, it [15] leaked.

[16] **MR. ORGEL:** But postpetition, it [17] leaked through a hole that existed April 1st [18] because we were rebuilding the roof.

[19] **THE COURT:** No. No. [20] As of April 1st you tied it in. So [21] it didn't leak on April 1st.

[22] **MR. ORGEL:** No. No. [23] April 1st, they're working on it. [24] No rain.

Page 21

[1] By April 11th, they go off the job, [2] and they tie it off.

[3] **THE COURT:** So.

[4] **MR. ORGEL:** So April 1st, I don't [5] think — I mean, maybe there will be testimony as [6] to what the condition was April 1st. I'm assuming [7] they tied it off because it would have been worse [8] if they didn't tie it off.

[9] So that April 1st, you may have had [10] open roof, or you may have had more of a tie off.

[11] **THE COURT:** I assume I'm going to [12] hear testimony on this, and I can't make a [13] decision until I hear the testimony.

[14] **MR. ORGEL:** I'm not fighting you. [15] That will come out in testimony.

[16] What I'm trying to focus on that's [17] not — that the tenor of the testimony, if focused [18] on what was the condition April 1st versus April [19] 11th is going to be very different than if Your [20] Honor rules that, regardless of what the condition [21] was April 1st, regardless, the repair and [22] maintenance obligation includes the obligation as [23] a postpetition matter to replace the roof.

[24] If that's the case, the testimony

Page 22

[1] goes to what's the cost of replacement?

[2] **THE COURT:** Well, I'm going to hear [3] all the testimony. I'm not going to make my [4] ruling until I hear any testimony.

[5] So maybe we save the argument until [6] after I hear the testimony. I think that's the [7] best.

[8] **MR. ORGEL:** Okay. Including the [9] testimony on the cost of the curb and

[10] **THE COURT:** Yes.

[11] **MR. ORGEL:** Okay. All right. [12] Your Honor, well then Mr. Frye from [13] my firm will be conducting — will be putting on [14] the evidence.

[15] **THE COURT:** All right.

[16] **MR. ORGEL:** Thank you, Your Honor.

[17] **THE COURT:** Why don't you save your [18] opening until closing. Is that okay?

[19] **MR. BENEDICT:** If it please the [20] Court, and I just wanted to identify one point [21] from the July 17th hearing, so we don't have to go [22] through that.

[23] I asked counsel for the Debtor if [24] they had an opportunity to review the transcript

Page 23

[1] from that proceeding, and they said that they had [2] not; that they had talked with Mr. Stang, but had [3] not reviewed the transcript.

[4] I did print off a copy from the [5] Court's docket of the transcript, and there was [6] one ruling the Court made at that hearing that I [7] wanted to read into the record to at least advise [8] Debtors' counsel since they were not present. And [9] I think it assists the proceeding in the evidence [10] that will be presented here today.

[11] This appears on Page 154 of the [12] transcript, Line 11 from the Court. But I will [13] rule on a legal basis that maintenance [14] obligations, continuing obligations under the [15] lease, and I think Montgomery Ward would say that [16] if it arose postpetition, you know, it's something [17] the Debtor has to pay at the time it arose.

[18] And a factual stipulation has now [19] been entered, Your Honor, that the leak at the tie [20] began June 26th. So the evidence today is not did [21] it leak. What was the condition of the roof [22] before April 1st?

[23] There's a factual stipulation as to [24] that. I think that the evidence then to narrow

Page 24

[1] the issues for today is what's the appropriate [2] fix? And there will be

testimony with regards to [3] that issue.

[4] **THE COURT:** Okay. Well, whose [5] witness am I going to hear first, since we have a [6] combined motion to reject and motion to compel. [7] Do that parties care?

[8] I think they're looking to you.

[9] **MR. BENEDICT:** They have yielded to [10] me, I'm more than happy to proceed.

[11] My first witness will be Mr. John [12] Malinee.

[13] **MR. FRYE:** Your Honor, we'd like to [14] invoke the rule. Mr. Benedict said that there are [15] two witnesses.

[16] **THE COURT:** All right. [17] Any reason the second witness [18] shouldn't be sequestered?

[19] **MR. BENEDICT:** He's the designated [20] representative of the Debtor.

[21] **THE COURT:** Then he may remain, [22] All right. Who's your first [23] witness?

[24] **MR. FRYE:** Your Honor, if I may, we

Page 25

[1] had subpoenaed the 30(b)(6) designee of the DEC and [2] Shield Investments. And that was the designee [3] that is about to take the stand.

[4] Today they're trying to say that [5] there's another designee that is representing the [6] Debtor, or I'm sorry, the landlord. And it would [7] seem to me that that person should have been [8] produced for a deposition since we asked for their [9] designee, their corporate designee to be deposed.

[10] They seem to be shifting gears, Your [11] Honor.

[12] **MR. BENEDICT:** Actually, I think [13] there's a miscommunication. The designated [14] representative I identified as my other witness is [15] Fleming's designated representative, Mr. David [16] Stegmann.

[17] **MR. FRYE:** Fair enough. [18] Mr. Malinee is the designated [19] representative of DEC and Shield.

[20] **THE COURT:** All right. You may [21] swear in the witness.

[22] **THE CLERK:** Place your hand on the [23] Bible and state your name for the Court.

[24] **THE CLERK:** John William Malinee

Page 26

[1] **JOHN W. MALINEE,** [2] the deponent herein, having first [3] been duly sworn on oath, was [4] examined and testified as follows:

[5] **DIRECT EXAMINATION**

[6] **BY MR. BENEDICT:**

[7] **Q:** Good morning. Would you please state [8] your full name for the Court?

[9] **A:** John William Malinee.

[10] **Q:** And what is your —

[11] **THE COURT:** Could you please speak [12] into the Mike so we can hear you. Thank you.

[13] **MR. BENEDICT:** Do you want me to [14] begin again, Your Honor?

[15] **THE COURT:** No. We have his name.

[16] **MR. BENEDICT:** Thank you.

[17] **BY MR. BENEDICT:**

[18] **Q:** Who is your present employer?

[19] **A:** Intermobile Marketing.

[20] **Q:** And how long have you been employed by [21] Intermobile Marketing?

[22] **A:** Since about 1993.

[23] **Q:** And what is your current position with [24] Intermobile Marketing?

Page 27

[1] **A:** I'm president.

[2] **Q:** All right. And to your knowledge, what [3] is the relationship between Intermobile Marketing [4] Inc. and DEC Investments?

[5] **A:** It provides certain management services [6] for DEC Investments.

[7] **Q:** And what is the relationship between [8] Intermobile Marketing and Shield Investment [9] Company?

[10] **A:** It provides certain management services [11] for Shield.

[12] **Q:** And would you generally describe for the [13] Court those management services that Intermobile [14] Marketing provides to both DEC and to Shield?

[15] **A:** It provides real estate management and [16] accounting services for both of those entities.

[17] **Q:** And in your duties as the president of [18] Intermobile Marketing, which include the [19] management of certain properties of DEC and [20] Shield, does that include the management of [21] properties commonly known as 5100 Kansas Avenue?

[22] **A:** That is correct.

[23] **Q:** And who is the owner of 5100 Kansas [24] Avenue?

Page 28

[1] **A:** That would be DEC.

[2] **Q:** Okay. And do your duties include [3] responsibility with respect to property located at [4] 5150 Kansas Avenue?

[5] **A:** They do.

[6] **Q:** And who, to your knowledge, is the owner [7] of the 5150 Kansas Avenue facility?

[8] **A:** DEC Investments.

[9] **Q:** Is Intermobile Marketing responsible for [10] managing the property commonly known as 5200 [11] Kansas Avenue?

[12] A: That is correct.

[13] Q: And who is the owner of 5200 Kansas [14] Avenue?

[15] A: Shield Investments.

[16] Q: Now, I have seen reference in the [17] materials and on certain maps to a building called [18] 5250 Kansas Avenue. Are you familiar with that [19] facility?

[20] A: I am.

[21] Q: Could you explain to the Court what 5250 [22] is in relationship to 5200 Kansas Avenue?

[23] A: It is about 108,000 square foot building [24] that was built on property north of 5200.

Page 29

[1] Q: Okay. And is the 5250 building leased [2] separately to Fleming?

[3] A: Well, the 5200 leasing encompasses the [4] ground underneath the 5250 building.

[5] Q: Okay. And in your duties with [6] InterMobile, you are familiar with each of those [7] properties?

[8] A: That is correct.

[9] Q: And you've actually been to each of those [10] properties?

[11] A: I have.

[12] Q: And you're familiar with their physical [13] characteristics?

[14] A: Yes, I am.

[15] Q: Mr. Malinee, there are a number of [16] exhibit notebooks in front of you. And we've [17] previously handed up to the Court an exhibit [18] notebook. And this will be the first one labeled [19] exhibit notebook — the slightly larger one.

[20] I believe it still has on it the [21] cover page from the last hearing, which says that [22] the hearing is July 17th at three o'clock that may [23] help you identify which book we're talking about.

[24] And I would ask you to turn to

Page 30

[1] document number one in the exhibit book.

[2] Mr. Malinee, do you recognize that [3] document?

[4] A: I do. It's a sublease for property at [5] 5100 Kansas Avenue.

[6] Q: And who are the parties to that sublease?

[7] A: By and between DEC Investments, Inc. and [8] Fleming Companies, Inc.

[9] Q: Okay. Now, just so that the Court [10] understands, this is denominated as a sublease. [11] Can you explain to the Court why this is called a [12] sublease?

[13] A: The original property was acquired under [14] an industrial revenue bond.

So there was a lease [15] between DEC in this case and the City of Kansas [16] City, Kansas.

[17] And then this was identified as a [18] sublease when DEC leased it to Fleming.

[19] Q: And would you explain to the Court what [20] an industrial revenue bond is?

[21] A: It's a means by which financing is [22] obtained whereby the governmental entity lends its [23] credit status to the lender for — to the — to [24] the lessor, in this case, the lessee to obtain

Page 31

[1] financing. And thereby, the governmental agency [2] holds title until such times as those bonds are [3] retired.

[4] Q: And have these bonds been retired on [5] 5100?

[6] A: Yes, they have.

[7] Q: So at the present time at 5100, DEC is [8] now the fee owner?

[9] A: That is correct.

[10] Q: And there's no outstanding obligation to [11] Wyandotte County or the City of Kansas City, [12] Kansas other than periodically accruing tax [13] obligations?

[14] A: That is correct.

[15] Q: Mr. Malinee, I'm going to ask you to turn [16] to Document Exhibit Number 2 and ask you if you [17] can identify that document.

[18] A: That's a lease on property 5150 Kansas [19] Avenue by and between DEC Investments and Fleming [20] Companies.

[21] Q: And I'm going to ask you to turn to [22] Document Exhibit Number 3, and ask you to identify [23] that for the Court.

[24] A: Sublease agreement on property at 5200

Page 32

[1] Kansas Avenue between Shield Investments and [2] Fleming Companies.

[3] Q: And this is the lease that you've [4] testified also encompasses the 5250 building?

[5] A: That is correct.

[6] Q: Okay. An this is denominated as a [7] sublease that also — because there was an [8] industrial revenue bond on this facility?

[9] A: That is correct.

[10] Q: And has the industrial revenue bond been [11] retired?

[12] A: It has.

[13] Q: And is Shield now the fee owner of this [14] property?

[15] A: Shield is.

[16] MR. BENEDICT: Okay. I would move

[17] to admit Exhibits 1, 2 and 3.

[18] MR. FRYE: No objection, Your [19] Honor.

[20] THE COURT: Well, let's wait on the [21] exhibits until the end of your case.

[22] MR. BENEDICT: That's fine, Your [23] Honor.

[24] BY MR. BENEDICT:

Page 33

[1] Q: Mr. Malinee, why don't we start with [2] Exhibit Number 1, then I'll ask some questions [3] about the specific exhibits. And Exhibit 1 is a [4] sublease.

[5] And if I slip in and call it a lease [6] rather than a sublease, will you understand what [7] I'm talking about when I'm referring to Exhibit [8] Number 1?

[9] A: I will.

[10] Q: Okay. I would ask you to turn to [11] Paragraph 9.2 under this document.

[12] A: I'm there.

[13] Q: And if you would take a moment to read [14] that paragraph to yourself.

[15] A: I am.

[16] Q: Okay. Pursuant to this particular [17] sublease as between DEC Investments and Fleming, [18] who has an obligation to maintain the premises [19] during the existence of this lease?

[20] A: Fleming Companies.

[21] Q: Okay. And also pursuant to this [22] paragraph, who has the obligation to clean the [23] premises?

[24] A: Fleming Companies.

Page 34

[1] Q: Okay. I will ask you then to turn to [2] Paragraph 5.4.1.

[3] THE COURT: Are you on Exhibit 1?

[4] MR. BENEDICT: Yes, Your Honor. [5] I'm sorry, 5. — sorry, 6.4.1.

[6] THE COURT: Okay.

[7] MR. BENEDICT: I had them reversed, [8] Your Honor. The numbering in the lease and the [9] sublease is one paragraph off after paragraph [10] four. I'm sorry.

[11] BY MR. BENEDICT:

[12] Q: I'm sorry. Are you at 6.4.1?

[13] A: I am.

[14] Q: Would you read that to yourself, sir.

[15] A: (Witness reviewing.)

[16] I have.

[17] Q: With respect to any construction or [18] capital improvements on the premises, does Fleming [19] have an obligation under this particular sublease [20] to obtain landlord consent?

[21] A: It's required to obtain the landlord's [22] prior written approval. That's

correct.

[23] Q: All right, sir.

[24] The sublease. I'm now going to ask

Page 35

[1] you to turn to Paragraph 19.

[2] A: I'm there.

[3] Q: And as long as this lease is in effect, [4] sir, who is responsible for payment of utilities [5] on the premises?

[6] A: The tenant.

[7] Q: I'm now going to ask you to turn to [8] Paragraph 25.4 of the lease.

[9] THE COURT: Would you go back to — [10] Paragraph 19 is what you were talking about?

[11] MR. BENEDICT: Yes, Your Honor.

[12] THE COURT: My paragraph 19 talks [13] about utilities.

[14] MR. BENEDICT: That's the question [15] that I asked, Your Honor.

[16] THE COURT: I thought it was [17] repairs.

[18] MR. BENEDICT: No, Your Honor. I [19] asked who was responsible for utilities.

[20] THE COURT: All right. I'm sorry. [21] And what's your next paragraph?

[22] MR. BENEDICT: The next paragraph [23] is 25.4.

[24] Is everyone there?

Page 36

[1] THE COURT: Yes.

[2] THE WITNESS: I'm there.

[3] BY MR. BENEDICT:

[4] Q: With respect to hazardous materials, [5] Mr. Malinee, as between DEC and Fleming, who has [6] the obligation as long as this lease is in effect [7] to remove hazardous materials from the leased [8] premises?

[9] A: The tenant, Fleming.

[10] Q: And lastly, sir, I'm going to ask you to [11] turn to Paragraph 9.3 of the sublease.

[12] A: I'm there.

[13] Q: Upon the termination of the lease term, [14] does the landlord have rights to request Fleming [15] to take certain actions with respect to this [16] property?

[17] A: That is correct.

[18] Q: And with respect to this paragraph, does [19] the landlord have the right to request Fleming to [20] restore access to the premises?

[21] A: That's correct.

[22] Q: Okay. Now, let's turn to Exhibit Number [23] 2, which is a lease agreement between DEC and [24] Shield. And again, with regards to maintenance

Page 37

[1] and cleaning, —

[2] A: Pardon me. Between DEC and Fleming.

[3] Q: Between DEC and Fleming, my apologies. [4] Thank you for correcting me.

[5] With respect to maintenance and [6] cleaning, if you would turn to Paragraph 8.2.

[7] A: I'm there.

[8] Q: And under this lease, for 5150 Kansas [9] Avenue, as between DEC and Fleming, who has the [10] obligation to maintain the premises and to clean [11] the premises?

[12] A: The tenant, Fleming.

[13] Q: Okay. And since I've pointed everyone to [14] the last — in the last lease to the wrong [15] paragraph, I believe it's 5.4.1 in the lease [16] agreement, Exhibit 2.

[17] A: 5.4.1?

[18] Q: Yes.

[19] A: Okay.

[20] Q: 5.4.1.

[21] And with respect to capital [22] improvements and construction on site, is there an [23] obligation to obtain approval of the landlord?

[24] A: That's correct. Prior written approval.

Page 38

[1] Q: Paragraph 18 with respect to utilities.

[2] A: I'm there.

[3] Q: As with respect to DEC and Fleming, as [4] between the two, who has the obligation as long as [5] this lease is in effect to pay for utilities?

[6] A: Tenant shall pay all costs incurred for [7] all utilities used on the leased premises.

[8] Q: And then if you'll turn to Paragraph [9] 24.4.

[10] A: Okay.

[11] Q: As between DEC and Fleming, who has the [12] obligation to remove hazardous materials?

[13] A: The tenant, Fleming.

[14] Q: And lastly, in this lease, I'll ask you [15] to turn to Paragraph 8.3.

[16] A: I'm there.

[17] Q: At the surrender — pardon me. At the [18] termination of the lease term, can the landlord [19] ask Fleming to take certain actions with respect [20] to this property?

[21] A: He can.

[22] Q: Does that action include providing access [23] to the facility?

[24] A: It does.

Page 39

[1] Q: Does that include removal of [2] interconnects with non-owned property?

[3] A: It does.

[4] Q: I'm now going to ask you to turn to [5] Exhibit Number 3, which, again, is a sublease. [6] And this is the sublease between Shield and [7] Fleming with respect to 5200 and 5250 properties.

[8] A: Okay.

[9] Q: And again, I'm going to direct you to [10] Paragraph 9.2, and ask you whether that contains [11] the same maintenance and cleaning obligations that [12] are prior to leases of the prior two leases?

[13] A: It does.

[14] Q: I want to direct you, then, to Paragraph [15] 6.4.1. And whether it contains the same landlord [16] approval requirements of the other two leases for [17] any alteration and construction of the — on the [18] premises.

[19] A: It does.

[20] Q: I'm going to direct you to Paragraph 19, [21] whether it contains the same utility requirements [22] of the other leases?

[23] A: It does.

[24] Q: I'm going to direct you to Paragraph 25.4

Page 40

[1] and ask you whether it contains the same hazardous [2] material requirements as the other leases?

[3] A: It does.

[4] Q: And last, I'll ask you to turn to [5] Paragraph 9.3.

[6] A: I'm there.

[7] Q: And I'll ask you whether this lease also [8] contains the same requirements that if at the [9] landlord's request, Fleming must restore access [10] and remove the interconnects between the [11] buildings?

[12] A: It does.

[13] Q: And Mr. Malinee, if I could ask you to [14] refer to Exhibit B as in boy to the 5200 lease, [15] which is Exhibit Number 3.

[16] MR. BENEDICT: If it helps the [17] Court, it's the map.

[18] THE COURT: Okay.

[19] THE WITNESS: I'm there.

[20] BY MR. BENEDICT:

[21] Q: Would you generally describe to the Court [22] what Exhibit B is?

[23] A: It's a drawing of the combined facilities [24] at 5300, 5200 and 5100 Kansas Avenue.

Page 41

[1] Q: Now, Mr. Malinee, I'll draw your [2] attention, there appears to be what looks to be a [3] rail line. Is that — and does that represent a [4] rail line along the right-hand side of that [5] document?

[6] A: It does.

[7] Q: Is it correct that the rail line also has [8] a spur that runs between both the DEC and Shield [9] facilities?

[10] A: Runs between the buildings at 5200, 5100, [11] and 5150. That's correct.

[12] Q: And so at the time of the commencement of [13] the lease for 5200, which is the Shield facility, [14] did Shield have access to the rail spur through [15] that rail line?

[16] A: Shield did.

[17] Q: I'm asking now for you to look to the [18] upper part of this exhibit. Again, I'm looking at [19] it as a book page.

[20] Are those graphic representations of [21] trucks right above where it says 5200?

[22] A: I can't identify what you're indicating.

[23] THE COURT: I don't see 5200 on it, [24] either.

Page 42

[2] BY MR. BENEDICT:

[3] Q: There's a phrase new docks. Do you see [4] the phrase new docks?

[5] A: I do.

[6] Q: Okay. And then there's an arrow [7] pointing?

[8] A: Correct.

[9] Q: What does that — what is that referring [10] to?

[11] A: The westward docks on the building, which [12] is identified on this exhibit as existing [13] building, which is the building at 5200.

[14] Q: And it's identified as existing building [15] why?

[16] A: It was in existence, built and completed [17] prior to the time of the lease.

[18] Q: Okay. Was the addition to Shield's [19] facility in existence at the time of the lease?

[20] A: No, sir.

[21] Q: Now, I see a reference on this diagram to [22] Kansas Avenue. Is this a state highway, sir?

[23] A: That is K-32.

[24] Q: At the time of commencement of the lease,

Page 43

[1] did Shield have access to Kansas Avenue?

[2] A: It did it in this drawing, and this [3] drawing depicts it.

[4] Q: So this entrance is on Shield's property [5] in this diagram?

[6] A: That is correct.

[7] Q: Now, I see a reference to ramps, and then [8] a squiggly line that appear to connect the Shield [9] facility and Shadrall facility at commencement of [10] the lease. Did those ramps exist?

[11] A: They did not.

[12] Q: Okay. Do you identify them as ramps [13] today?

[14] A: I believe in Fleming's vernacular, [15] they're identified as masking points, north and [16] south matter points.

[17] Q: So since the commencement of the lease, [18] those ramps have been constructed?

[19] A: They have.

[20] Q: And now they're called master links?

[21] A: That's how Fleming has referred to it. [22] Correct.

[23] Q: Now, with respect to the access that [24] you've identified that Shield had, did Shield have

Page 44

[1] access to both eastbound and westbound traffic on [2] Kansas Avenue, which is also known as Kansas [3] Highway 32?

[4] A: They did.

[5] Q: Again, looking at this document, there [6] appears to be another building identified as [7] Shadrall facility 5300. Do you see that on the [8] map, sir?

[9] A: I see the Shadrall facility.

[10] Q: To your knowledge, what does that [11] represent in this drawing?

[12] A: About a 417,000 square foot warehouse.

[13] Q: And is that owned by Shield?

[14] A: It is not.

[15] Q: Is that on Shield's property?

[16] A: No, sir.

[17] Q: And Shield didn't own it at the time of [18] the leases, did it?

[19] A: No.

[20] Q: Are you property manager of the Shadrall [21] facility?

[22] A: I am not.

[23] Q: To your knowledge, did either your [24] company, or Intermobile, or Shields, or DEC have

Page 45

[1] any relationship to the owner of the Shadrall [2] facility?

[3] A: No, sir.

[4] Q: No, you don't know, or no, you

have no [5] relationship?

[6] A: No. I have no relationship.

[7] Q: Thank you. I just wanted to make sure we [8] had a clear record.

[9] After the execution of this lease in [10] September 1993, did Fleming undertake any [11] alterations of the premises?

[12] A: Extensive alterations.

[13] Q: Would you generally describe for the [14] Court the alterations that Fleming undertook with [15] respect to these buildings?

[16] A: They removed the rail spur from the main [17] line that entered the facilities west of 5150 and [18] east of 5200.

[19] In the 5150 building, they added [20] about 22,000 square foot of office space, [21] eliminating about six dock doors. In 5150, they [22] converted dry warehousing to about 50,000 square [23] feet of refrigerated space that would be utilized [24] at a temperature of 26 to 36 degrees.

Page 46

[1] They connected two corridors between [2] 5150, 5100, and 5200. And in 5200, they converted [3] it from a dry warehouse to a 22-below freezer, [4] which required the removal of a floor installation [5] of a glycol system.

[6] In the facility at 5150, they [7] constructed what is commonly known as a compressor [8] room that maintained the ammonia system. And they [9] installed piping across the roofs of those [10] buildings to effect the refrigeration in buildings [11] 5200 and 5100.

[12] They made other interior alterations [13] to the interior walls to set the refrigeration [14] walls and provide for refrigerated docks.

[15] Q: Did they also build the 5250 building?

[16] A: They did build the 5250 building as well [17] as what is identified on Exhibit B as ramps more [18] known as master links that connected to the [19] Shadrall property.

[20] Q: Have the fire suppression systems been [21] interconnected?

[22] A: They have.

[23] Q: The control panel for the fire [24] suppression system, so if a fire goes off and you

Page 47

[1] need to look at a control panel to identify where [2] a fire occurs, where is that fire control panel [3] located?

[4] A: The alarm system that monitors the fire [5] suppression system, if that's what you're [6] referring to, the base station for that resides on [7] the Shadrall property in what is commonly referred [8] to as a guard shack at the entrance at 5300.



[9] Q: And so the control panels for the alarm [10] system which also controls the fire suppression [11] system is located on Shadrall's property, not [12] Shield's property?

[13] A: That's correct.

[14] Q: I'm going to — excuse me. I'm going to [15] direct your attention to Exhibit Number 10 in your [16] book. And I have a blowup that I will —

[17] MR. BENEDICT: If I may approach [18] the case, Your Honor?

[19] THE COURT: Maybe you should bring [20] it so that others can see it as well. Bring the [21] case over.

[22] MR. BENEDICT: Unfortunately, it [23] doesn't have legs. It has to stand on a table.

[24] THE COURT: All right. You can

Page 48

[1] leave it there then.

[2] BY MR. BENEDICT:

[3] Q: And for the Court and counsel, the blowup [4] is an exact copy of Exhibit Number 10.

[5] Mr. Malinee, with reference to [6] Exhibit Number 10, can you identify that for the [7] Court?

[8] A: That's an asbuilt survey, which is dated [9] July 9, 2003 as prepared by Road Surveyors, Inc.

[10] Q: And are they licensed surveyors in the [11] State of Kansas?

[12] A: They are.

[13] Q: And is there authentication of this [14] exhibit attached with their seal along the lower [15] right corner of the document?

[16] A: There is.

[17] Q: Okay. With respect to this survey, would [18] you identify — and if it helps the Court, either [19] have Mr. Malinee step to the blowup or merely walk [20] us through the map to identify the master links [21] and the access issues.

[22] MR. BENEDICT: I don't know how it [23] would be best for Your Honor to be walked through [24] it.

Page 49

[1] THE COURT: He can just tell me [2] where it is on the survey.

[3] MR. BENEDICT: That's fine.

[4] BY MR. BENEDICT:

[5] Q: Mr. Malinee, would you direct the Court [6] and explain to the Court where the master links [7] between the Shadrall facility are and the Shield [8] facility?

[9] A: There's two master links. There's one at [10] the top end of the property line close to the [11] Sante Fe Railroad lines. That was construction.

[12] And then there's one on the middle

[13] of the page that connects the 5200 building to the [14] Shield.

[15] Q: Okay. Can you generally describe to the [16] Court the nature of the construction of the master [17] links? Are those temporary or permanent [18] structures?

[19] A: They're built out of cast concrete with [20] permanent roof fittings that attach the two [21] facilities.

[22] Q: Okay. And with respect to those master [23] links, there is a vertical line running through [24] those towards the left-hand side of the master

Page 50

[1] links. Is that the property line?

[2] A: That represents the property line. It's [3] 35.7 feet east of the east wall of the Shadrall [4] property.

[5] Q: And if you continue down that property [6] line until it intersects with the highway, Kansas [7] Avenue, is there currently an access point onto [8] Kansas Highway 32 from the Shield facility?

[9] A: The asbuilt survey identifies an access [10] point that was existing prior to the alterations [11] by Fleming. There is not an access point to that [12] street at this point in time.

[13] Q: And there are two circles along Kansas [14] Avenue, K-32 Highway. Do those represent the [15] endpoints of where the prior access existed?

[16] A: Thereabouts, yes.

[17] Q: Okay. And if you also continue south — [18] or pardon me, yeah, south on the map, onto Kansas [19] Avenue, Kansas Highway 32, is there a median on [20] Kansas Highway 32?

[21] A: There is a median.

[22] Q: And is there a median cut to allow access [23] to the Shield facility?

[24] A: Not on this drawing, no, sir.

Page 51

[1] Q: And as it exists today, is there a median [2] cut to permit access from eastbound Kansas [3] Highway [4] 32 onto the Shield facility?

[5] A: Under the Shield facility, there is not [6] an access.

[7] Q: Now, I think you identified that the [8] property line is 35.7 feet from the edge of the [9] building?

[10] A: East of the east wall of Shadrall's [11] property. That's correct.

[12] Q: Okay.

[13] THE COURT: That's from the [14] Shadrall property?

[15] THE WITNESS: That is correct.

[16] THE COURT: Okay.

[17] BY MR. BENEDICT:

[18] Q: And how close — pardon me. Let me [19] rephrase that.

[20] Could you open up this prior access [21] point without being within 20 feet of the Shadrall [22] property line?

[23] A: I believe current DOT regs do not allow [24] an access from a highway within 22 feet of the [25] property line.

Page 52

[1] Q: Okay. So could you physically at this [2] point in light of the DOT regs, and I'm asking [3] physically as it — as with respect to this [4] property line, you couldn't relocate the prior [5] access point because it would be within 20 feet of [6] the Shield property line?

[7] Let me rephrase the question, [8] Was the prior access point within 20 [9] feet of the Shadrall property line?

[10] A: I believe it was.

[11] Q: Now, Mr. Malinee, again, referring to [12] Exhibit Number 10 on the east side of the Shield [13] facility, the building commonly known as 5250 [14] Kansas Avenue, there appears to be a parking lot. [15] Is that parking lot on Shield's property?

[16] A: I think you need to restate your [17] question.

[18] Q: Okay. Referring to Exhibit Number 10, —

[19] A: Mm-hmm.

[20] Q: — first let's identify 5250. Have you [21] located 5250?

[22] A: I've located 5250.

[23] Q: Okay. Immediately east of the 5250 [24] building, is there a parking lot?

Page 53

[1] A: The diagram indicates there's a parking [2] lot and a detention basin.

[3] Q: Now, is that parking lot and detention [4] basin located on Shield's property?

[5] A: It is not.

[6] Q: Okay. Does Shield have access to that [7] parking lot from the 5250 building?

[8] A: They do not.

[9] Q: Why not?

[10] A: It's not their property.

[11] Q: Okay. Are there any doors on that side [12] of the 5250 building?

[13] A: There are no dock doors in the 5250 [14] building.

[15] Q: All right. And what is a dock door for [16] the Court?

[17] A: It's a door rolled up normally ten by ten [18] that allows trucks to back up in the facility in [19] which you can load merchandise in and out of the [20] facility.

[21] Q: And not to overstate the obvious,

but is [22] that important for a warehouse facility?

[23] A: I would think that it would be.

[24] Q: Are there any other characteristics of

Page 54

[1] the 5250 building which limit its utility as a [2] warehouse?

[3] A: Well, its utility is limited by the [4] design of the warehouse. And without specific [5] dock doors in that facility, the closest dock [6] doors from the back of that facility are in excess [7] of 600 feet. And those dock doors would only [8] reside on either Shadrall's property and or DEC's [9] property.

[10] Q: Now, dock doors, just talking about dock [11] doors for the moment. I think in one of the [12] depositions, one of the transcripts reflected that [13] as doctor. And I just don't want to talk about [14] medical doctors.

[15] Are dock doors normally located at [16] ground level?

[17] A: No. They're the dock door which reside [18] 51 to 46 inches above ground outside the [19] building.

[20] Q: And would that correspond to an inside [21] floor level?

[22] A: That's correct.

[23] Q: Is the inside floor level of the 5250 [24] building elevated?

Page 55

[1] A: In the areas that you've identified in [2] that north addition, it is at ground level.

[3] Q: So even if you put in dock doors, you'd [4] have some difficulty using that facility?

[5] A: You'd have to either raise the floor of [6] the facility 51 inches or dig a hole.

[7] Q: I'm going to ask you, Mr. Malinec, now to [8] turn to Exhibit Number 11, and ask you to identify [9] that for the Court.

[10] THE COURT: I'm sorry. What [11] exhibit number?

[12] MR. BENEDICT: Exhibit Number 11, [13] Your Honor.

[14] THE COURT: Thank you.

[15] THE WITNESS: That is Page 2 of 2 [16] of the road survey dated July 9th, 2002. And it [17] provides a detailed blowup of the properties at [18] 5200, 5250, 5100 and 5150 Kansas Avenue.

[19] MR. BENEDICT: If it please the [20] Court, I think I might be able to utilize some [21] space here on the corner if that won't block the [22] view of any of the parties from where they're [23] located.

[24] THE COURT: That's fine.

Page 56

[1] MR. BENEDICT: Is that going to [2] block anyone's view?

[3] MR. FRYE: We can't see it.

[4] THE COURT: Well, you can move. [5] That's fine.

[6] MR. BENEDICT: Can you see the [7] exhibit?

[8] MR. ORGEL: From here, if it's okay [9] that I can stand.

[10] BY MR. BENEDICT:

[11] Q: Mr. Malinec, there are photographs [12] attached to the side of that exhibit. Can you [13] identify those photographs for the Court?

[14] A: I can. The top two photographs are an [15] east and westbound picture of the north master [16] link between 5250 and the Shadrall property.

[17] The center two photographs are an [18] east and westbound picture of the south master [19] link between the 5200 and the Shadrall property.

[20] And the bottom three pictures, the [21] first one to the left is a picture of the existing [22] median just south of the original entrance to the [23] Shield property.

[24] The second picture is a picture of a

Page 57

[1] curb that has been altered at the original [2] entrance to the Shield property off of Kansas 32.

[3] And the last picture, Picture Number [4] 7 is a picture looking south from the 5250 parking [5] lot towards K-32 which identifies that that [6] existing original entrance had been closed and was [7] used for trailer parking.

[8] Q: Are these true and accurate photos of the [9] state of the property on September 9, 2003 when [10] the road surveying —

[11] A: They are.

[12] Q: — and this survey was conducted?

[13] Is this still the status and an [14] accurate depiction as the property sits today?

[15] A: It is.

[16] Q: Now, with respect to the diagram, there [17] is space identified as freezer space, 50 — pardon [18] me. Is that 69,360 square feet?

[19] A: That's the internal square footage of the [20] freezer space in 5200. And then the refrigerated [21] dock, an additional 18,210.

[22] Q: And are these the parts of the building [23] that were altered by Fleming to become a [24] refrigerated freezer warehouse space?

Page 58

[1] A: They are.

[2] Q: As of the commencement of the bankruptcy [3] case on April 1st of 2003, what was the [4] approximate temperature in the freezer, if you [5] know?

[6] A: About 22 below.

[7] Q: And that is the 5100 — pardon me. [8] That's the 5200 building; correct?

[9] A: The 5200 building.

[10] Q: And that's the Shield facility; correct?

[11] A: That's correct.

[12] Q: Okay. Now, moving to the east on the [13] map, there is an area listed as refrigerator [14] storage, 34,960 square feet.

[15] Do you see that on the map, sir?

[16] A: I do.

[17] Q: And immediately north of that, there is [18] another area identified refrigerated storage, [19] 7,240 in square feet. Do you see that on the map?

[20] A: I do.

[21] Q: Are those two spaces together with [22] refrigerated dock referenced there, the areas [23] converted by Fleming to be refrigerated warehouse [24] space?

Page 59

[1] A: They are.

[2] Q: And as of April 1st, 2003, approximately [3] what was the temperature of those areas, if you [4] know?

[5] A: In the 7,200 square foot space, it was [6] about 26 to 28 degrees.

[7] In the 34 and 18 or 10,000 remember [8] refrigerator rated dock, it was about 35.

[9] Q: And would those temperatures have been [10] about the same as of April 3rd, 2003?

[11] A: That's correct.

[12] Q: At what point did you become aware of the [13] filing of the bankruptcy?

[14] A: Morning of April 1.

[15] Q: And did you have occasion on April 1st to [16] visit the facilities?

[17] A: I did.

[18] Q: So the observations you made with respect [19] to the facilities are based on your [20] contemporaneous knowledge of visiting the [21] facilities on that date?

[22] A: That's correct.

[23] Q: Okay. On April 1st, were there still [24] employees of Fleming on the premises?

Page 60

[1] A: Absolutely.

[2] Q: How many employees did, round numbers, if [3] you know, were still

present on April 1st?

[4] A: In the three shifts, probably in excess [5] of 400.

[6] Q: Was there inventory --- let me rephrase [7] that. What was Fleming using these warehouses [8] for, to your knowledge?

[9] A: To store food grade inventory.

[10] Q: I've heard this described as the Kansas [11] City Distribution Center. Would that be a fair [12] description?

[13] A: It is.

[14] Q: Okay. Did Fleming still have inventory [15] and operations as of April 1st of 2003?

[16] A: They did.

[17] Q: And were those operations continuing on [18] April 3rd of 2003?

[19] A: They were.

[20] Q: To your knowledge, how long did they [21] continue to move inventory out of that facility?

[22] A: Right up until the end of May.

[23] Q: During your visits in April, were there [24] any capital improvements ongoing at the time?

Page 61

[1] A: They were in the process of roofing 5150 [2] to convert that space to future perishable [3] refrigerated space.

[4] Q: When you say that they intended to [5] convert it to future perishable space, do you mean [6] Fleming?

[7] A: I do.

[8] Q: And how did you acquire your knowledge [9] that they were intending to convert it to future [10] perishable space?

[11] A: Several --- upon my observation of the [12] building on April 1 and the first week of April, [13] several fold. I noticed that there was roofing [14] work being done, made a telephone call to [15] Fleming's employee, David Stegmann.

[16] He identified that they were in the [17] process of roofing that, and that the [18] configuration of the roof is significantly [19] different than the existing roof for the purpose [20] of future refrigeration space, that they were [21] going to close their North Atlantic property and [22] move that facility's inventory into this facility [23] was the original intent.

[24] Q: And when you say North Atlantic property,

Page 62

[1] did Fleming maintain a warehouse on North Atlantic [2] Street in Kansas City?

[3] A: That's correct.

[4] Q: Now, if someone were to tell you, [5] Mr. Malinee, that as of April 1st and as of [6] April 3rd these properties were

dark and with no [7] operations and utilities had been discontinued, [8] would those have been accurate statements as of [9] April 3rd?

[10] A: That would have been highly inaccurate.

[11] Q: Okay. Mr. Malinee, I'll ask you to turn [12] in your exhibit book to Exhibit Number 29.

[13] A: I'm there.

[14] Q: Can you identify for the Court what [15] Exhibit 29 is?

[16] A: That is a picture of the roof at 5150 [17] depicting the temporary termination line that had [18] been installed by D.C. Taylor on or about [19] April 6th through 10th. You can see in the [20] background that D.C. Taylor's employees were still [21] on the roof, and that --- the different [22] construction of the two roofing materials.

[23] Q: Okay. In looking at this photograph on [24] Exhibit 9, which part is the new roof and which

Page 63

[1] part is the old roof?

[2] A: The bright white to the right of the [3] picture is the installation of the new roof. The [4] roof to the left, which is gray in nature, is the [5] original metal steamed roof to build.

[6] Q: And who took this photograph?

[7] A: I did.

[8] Q: And is this a true and accurate depiction [9] of the temporary termination seam as it stood on [10] or about April 10th?

[11] A: It is.

[12] Q: If you'll turn in your book to Exhibit [13] Number 30. And if you'd identify for the Court [14] what that is.

[15] A: That is the south wall to the facility at [16] 5150 to the left. It's a picture being taken from [17] the north --- north to the south. The left is the [18] installation of the new roof. To the right is the [19] existing roof.

[20] And in the center is the temporary [21] termination line that was installed by D.C. [22] Taylor.

[23] Q: Now, referring back to Exhibit Number 11, [24] which is the map and survey of the facility, --

Page 64

[1] A: Mm-hmm.

[2] Q: --- what portions of the 5150 building had [3] been completed, the roof completed as of April [4] 10th of 2003?

[5] A: Of 5150?

[6] Q: Of 5150.

[7] A: 5150 is designated as the property north [8] of the common wall easement.

You're looking at --- [9] I'm sorry. I was on the wrong.

[10] Q: This is Exhibit Number 11, sir.

[11] A: Yeah. It would be the eastern portion of [12] the 45,610 square feet, as well as the 22,580 [13] square feet in that picture on Exhibit 11.

[14] THE COURT: Could you say that [15] again?

[16] MR. BENEDICT: Would it help the [17] Court to have the witness draw a line on the map?

[18] THE COURT: No, just say it again.

[19] MR. BENEDICT: That's fine.

[20] THE WITNESS: I'm looking at [21] Exhibit 11.

[22] THE COURT: Yeah.

[23] THE WITNESS: The portion of the [24] roof that had been completed on April 10th, I

Page 65

[1] believe was the question, would be the eastern [2] portion of the warehouse space identified as [3] 45,610 square feet, as well as the eastern half of [4] the main office that is identified as 22,058.

[5] The western, the termination line [6] was installed in a north south linear line, and [7] the western 17,000 square feet of 5150 was not [8] complete.

[9] BY MR. BENEDICT:

[10] Q: Did you say 17,000?

[11] A: 17,000 square feet.

[12] THE COURT: Where's the 17,000 [13] square feet? Is it delineated on Exhibit 11?

[14] MR. BENEDICT: It is not. Your [15] Honor. He's testifying that that's what is [16] remaining off the roof to be completed. He's [17] trying to identify graphically where the [18] termination line was for the Court's benefit.

[19] THE COURT: So it didn't do all of [20] the 45,000 and the 22,000, or maybe --- did it do [21] all the 22,000?

[22] THE WITNESS: The western half of [23] 5150 which allowed 17,000 square feet to be [24] completed, that would reside very close to the

Page 66

[1] western half of the main office, 22,000 square [2] feet.

[3] THE COURT: Okay [4] MR. BENEDICT: And it runs north [5] south, I believe.

[6] THE COURT: Okay. All right.

[7] BY MR. BENEDICT:

[8] Q: At some point after filing the [9] bankruptcy, did you learn that there were leaks [10] occurring at that --- on the roof at 5150?

[11] A: I did.

[12] Q: Approximately, when was that?

[13] A: That would have been about June 26th.

[14] Q: And did you visit the premises at that [15] time?

[16] A: I did.

[17] Q: How frequently were you on the premises [18] between April 1st and June 26th?

[19] A: Almost a daily basis.

[20] Q: Okay. And who is the Fleming employee [21] you dealt with when you went to the facility?

[22] A: Joe Struempf always escorted me.

[23] Q: And what was your understanding of [24] Mr. Struempf's position with Fleming?

Page 67

[1] A: I believe he was the facility manager.

[2] Q: And did Mr. Struempf accompany you on or [3] about June 26th when you noted the leaks?

[4] A: He did.

[5] Q: Okay. And where were those roof leaks [6] located on or about June 26th?

[7] A: Those leaks were consistent with the [8] north-south termination line and were identified [9] right below that termination line.

[10] Q: And if you'll turn in your book to [11] Exhibit Number 32.

[12] A: I'm there.

[13] Q: Mr. Malinee, what is represented by [14] Exhibit Number 32?

[15] A: That is a picture of the internal ceiling [16] of the building at 5150 directly below the [17] temporary termination line that was installed by [18] D.C. Taylor.

[19] Q: Okay. And I'd ask you to turn to Exhibit [20] Number 33.

[21] A: I'm there.

[22] Q: And what does that picture depict?

[23] A: That is a spot along the temporary [24] termination line that was taken from the inside of

Page 68

[1] the building looking up towards the ceiling [2] underneath that temporary termination.

[3] Q: And is that bulge insulation bulging?

[4] A: Yes, it's filled with water.

[5] Q: Okay. I'll ask you to turn to Exhibit [6] 34.

[7] A: I'm there.

[8] Q: What does that exhibit reflect?

[9] A: That's another picture of the internal [10] roof of 5150 along the temporary termination [11] line. It was installed by D.C. Taylor, and it [12] represents a bulge containing water.

[13] Q: Okay. Turn to Exhibit Number 35. And if [14] you would identify what that depicts for the [15] Court.

[16] A: That is another location along the [17] north-south temporary termination line in Building [18] 5150 taken from inside the building looking up to [19] the ceiling. It represents a bulge which contains [20] water.

[21] Q: And last, I'll ask you to identify [22] Exhibit Number 36 to the Court.

[23] A: That is an additional picture of the [24] ceiling looking from the inside of the property at

Page 69

[1] 5150 along the temporary termination line that had [2] burst from the weight of the water.

[3] Q: And who took these photographs?

[4] A: I did.

[5] Q: And are these — when did you take these?

[6] A: Those photographs would have been taken [7] on — that would have been June 26th in the [8] presence of Joe Struempf, Fleming's employee.

[9] Q: And are those true and accurate [10] depictions of the interior ceiling as it existed [11] on June 26th?

[12] A: They are.

[13] Q: And just so I'm clear, Exhibit 32, 33, [14] 34, 35 and 36, are those the same locations, or [15] are we just taking photographs from different [16] angles of the same bulge, or are they different?

[17] A: Those are separate and distinct locations [18] along that termination line.

[19] Q: So I've noted, then, five separate leaks?

[20] A: That is correct.

[21] Q: Okay. I'll now ask you to turn to [22] Exhibit Number 37.

[23] A: I'm there.

[24] Q: If you'd identify to the Court what that

Page 70

[1] represents.

[2] A: That represents water that had penetrated [3] through the temporary termination line of Building [4] 5150 and spilled to the floor.

[5] Q: Please identify Exhibit Number 38, if you [6] would, please.

[7] A: That is water on the floor dripping from [8] one of the bulges in the internal insulation. [9] That picture is directly located at the west wall [10] of the 22,000

square foot office space directly [11] under the temporary termination line.

[12] Q: Okay. Would you identify Exhibit Number [13] 39 and Exhibit 40 for the Court?

[14] A: Those are additional pictures inside [15] 5150. Underneath bulges in the internal [16] insulation directly, the temporary termination [17] line.

[18] Q: And did you take these photographs, [19] Mr. Malinee?

[20] A: I did.

[21] Q: And did you take those on or about [22] June 26th?

[23] A: I did.

[24] Q: Are they a true and accurate depiction of

Page 71

[1] the property as it existed on June 26th?

[2] A: They are.

[3] Q: Since identifying the leaks on or about [4] June 26th, have you had any conversations with [5] Fleming employees with respect to the leaks?

[6] A: I'm sorry. Would you restate your question, please?

[7] Q: Yes. After you identified that the roof [8] was leaking at these locations on June 26th, did [9] you have any conversations with any Fleming [10] employee or Fleming representatives?

[11] A: Obviously, I discussed these leaks with [12] Joe Struempf, Fleming's employee, who was on site [13] at the facility.

[14] Q: Did you have any discussion with David [15] Stegmann about these leaks?

[16] A: He was aware of these leaks.

[17] Q: Did you have any discussions with either [18] Mr. Struempf or with Mr. Stegmann on what would be [19] the appropriate repair of these leaks?

[20] A: There was discussions with Joe Struempf [21] that he reviewed these pictures. He also reviewed [22] a letter from Blackburn Roofing that identified [23] the specific issues as it pertained to the

Page 72

[1] temporary termination line and the condition of [2] the roof.

[3] His initial response was that that [4] letter was very consistent with the crew he [5] escorted onto the roof at 5150 from D.C. Taylor.

[6] Q: Okay. And I just want to break that [7] down.

[8] At some point, did you learn from [9] Fleming's employees that Fleming had a roofing [10] contractor look at the roof?

[11] A: I learned from Joe Struempf at the



restoration plan?

[18] A: Significance concern. If you had sold [19] those compressors and removed them, you would not [20] have been able to abide by the two degrees, ten [21] degrees per week.

[22] Q: And why was this two degree, ten degrees [23] — two degrees a day, ten degrees a week plan so [24] important to you?

Page 79

[1] A: Immediately following the bankruptcy, I [2] had telephone discussions with Fleming's employee, [3] Dave Stegmann. And he identified the manner in [4] which they would shut the refrigeration systems [5] down.

[6] He identified that two degrees and [7] ten degrees per week maximum was consistent with [8] the responsible means by which to allow the [9] buildings to contract without causing permanent [10] damage to the facilities when you're bringing them [11] from 22 degrees below zero to ambient [12] temperature.

[13] Subsequently I had discussions with [14] D.C. Taylor or with RSC, who was the contractor [15] hired by Fleming to monitor the systems. And they [16] concurred with Mr. Stegmann's proposal to [17] reduce — raise those temperatures at those rates.

[18] Q: So you had concern about the impact on [19] your building structures if it wasn't addressed in [20] the manner described by Mr. Stegmann?

[21] A: That's correct.

[22] Q: And did Mr. Stegmann share those [23] concerns?

[24] A: I believe he did.

Page 80

[1] Q: Now, returning to the June 30th time [2] frame, the temperature restoration, I believe [3] you've identified had not yet been complete?

[4] A: That is correct.

[5] Q: I'm going to ask you now to turn to [6] Exhibit Number 15 in your book.

[7] A: Okay.

[8] Q: What is Exhibit 15, if you'd describe [9] those two items for the Court?

[10] A: Those are pictures taken of the [11] facilities at Kansas Avenue on or about July 1, [12] 2003.

[13] Q: And what does the first photograph [14] identify or reflect?

[15] A: Trailer park at the docks.

[16] Q: And is that the docks located at 5200 [17] Kansas Avenue?

[18] A: That's the docks located at 5300 Kansas [19] Avenue.

[20] Q: Oh, I'm sorry. Okay.

[21] How about the fork? What is [22] depicted in the second picture in Exhibit 15?

[23] A: Disabled forklifts that were on the [24] property at 5150 Kansas Avenue.

Page 81

[1] Q: And there are dates on these photographs?

[2] A: On this particular two, there are.

[3] Q: Okay. So these photographs were taken on [4] 7/1?

[5] A: That's correct.

[6] Q: Okay. And did you take these [7] photographs?

[8] A: I did.

[9] Q: Okay. Turning to page, or to Exhibit [10] Number 16, what is depicted in Exhibit 16?

[11] A: Those are — in the first photograph, [12] those are propane tanks that were on the [13] properties on 7/1.

[14] The second was a disabled scrubber [15] that was on the properties.

[16] Q: Also on 7/1?

[17] A: That's correct.

[18] Q: And you took these photographs?

[19] A: That's correct.

[20] Q: If you'll turn to Exhibit Number 17.

[21] A: Yes.

[22] Q: What is identified or depicted in Exhibit [23] 17?

[24] A: These are forklifts that were remaining

Page 82

[1] at the properties that contained batteries that I [2] took on 7/1 of '03.

[3] Q: Okay. If you'll look, then, to Exhibit [4] Number 18, and identify to the Court what is [5] reflected in Exhibit 18?

[6] A: Those are additional forklifts and/or [7] tugs that was used in the operation of Fleming [8] that were on the premises as of 7/1/03.

[9] Q: I see you took a lot of photographs of [10] forklifts. Why were you so concerned with [11] forklifts?

[12] A: Due to the nature that those particular [13] pieces of equipment required large batteries that [14] were hazardous materials in nature, as well as [15] large quantities of hydraulic fluid and other [16] fluids that could have harm to the property if not [17] properly disposed of.

[18] Q: To your knowledge post-bankruptcy, did [19] you have an agreement with Fleming with regards to [20] the disposal of forklift batteries and hazardous [21] materials?

[22] A: That they would all be removed.

[23] Q: But as of 7/1 they hadn't been?

[24] A: They had not.

Page 83

[1] Q: Okay. I'll ask you now to turn to [2] Exhibit Number 19.

[3] A: I'm there.

[4] Q: Would you identify for the Court what [5] Exhibit 19 is?

[6] A: Those are pictures inside the facility at [7] 5100 that represent assets of Fleming that were [8] still on the property on 7/1/03.

[9] Q: And did you take those photographs?

[10] A: I did.

[11] Q: Okay. Exhibit 20, if you would identify [12] that to the Court?

[13] A: Those are additional properties — [14] pictures that were taken at 5150 and 5100 of [15] assets in the general condition of those [16] properties that I took.

[17] Q: And I see these are dated June 30th?

[18] A: That's correct.

[19] Q: Of '03 of the —

[20] A: That's correct.

[21] Q: And you took those photographs?

[22] A: I did.

[23] Q: Continuing in the exhibit book to Exhibit [24] Number 21.

Page 84

[1] A: Those are additional pictures. The top [2] picture is the facility at 5100. And the bottom [3] picture is also at 5100.

[4] Q: Okay. Are both of these photographs June [5] 30th photographs?

[6] A: Yeah. They were taken about 6:30 p.m. [7] that night.

[8] Q: Exhibit Number 22?

[9] A: These are additional pictures that were [10] taken of facilities. These represent forklifts [11] and forklift batteries that were on the property [12] as of 7/1.

[13] Q: Now, moving forward in time, as of July [14] 31st, I believe we've now stipulated that these [15] items have been removed?

[16] A: They have.

[17] Q: And that the temporary has now been [18] restored?

[19] A: It has.

[20] Q: And the hazardous materials have been [21] removed?

[22] A: They have.

[23] Q: Were there employees of Fleming on the [24] premises on or about July 1?

Page 85

[1] A: There were.

[2] Q: Okay. Who, to your knowledge, was an [3] employee of Fleming and present on the premises on [4] July 1?

[5] A: Fleming's employee, Joe Struempf and [6] Fleming's employee, Doug Hudson.

[7] Q: And did they remain on the property [8] through at least July 11th?

[9] A: They did.

[10] Q: On or about July 27th, did you have [11] occasion to meet any other Fleming employees at [12] the property?

[13] A: The date you said was July 27?

[14] Q: Yes.

[15] A: Yes, I did.

[16] Q: And who did you meet with?

[17] A: I met with Fleming's employee, Joe [18] Struempf. Danny Apadocka (phonetic), Fleming's [19] employee who resided in Texas. Along with Mike [20] Ferrish (phonetic), a Fleming employee that [21] resided in Texas.

[22] Q: All right. And was Joe Struempf there?

[23] A: He was.

[24] Q: And not to belabor the point, but who let

Page 86

[1] you into the building?

[2] A: Joe Struempf, Fleming's employee.

[3] Q: Okay. As of July 27th, there was an [4] alarm system on this building, was there not?

[5] A: That's correct.

[6] Q: Did you have the alarm codes?

[7] A: No, sir.

[8] Q: Okay. But you had been provided a set of [9] keys?

[10] A: I had a key to the DEC and Shield [11] facilities as provided by Fleming's employee, Joe [12] Struempf.

[13] Q: And when did Mr. Struempf provide that to [14] you?

[15] A: It would have been on or about July 1st [16] or 2nd.

[17] Q: Okay. But you didn't have the alarm [18] codes?

[19] A: I've never had the alarm codes to this [20] building.

[21] Q: What was the purpose of the meeting at [22] the building on July 27th?

[23] A: On July 24th, that Friday, Mr. Stegmann [24] called me and requested that his two employees Dan

Page 87

[1] Apadocka and Mike Ferrish be given an opportunity [2] to walk through the facility.

[3] Q: And did you walk through the

facility [4] with them?

[5] A: I did.

[6] Q: Okay. Now, did they call you to get [7] access to the building at this point in time on [8] July 27th?

[9] A: Mr. Stegmann called me and asked if I [10] would walk through the facility with them, and I [11] conceded to that. They gained access to the [12] facility via Joe Struempf.

[13] Q: Okay. Now, the premises as they existed [14] on that walk through, they had — Fleming had [15] largely addressed during the month of July, then, [16] the issues that we now have identified on the [17] photos from the 1st of July; they've now cleaned [18] the premises?

[19] A: That's correct.

[20] Q: Okay. Now, did you have any part in the [21] cleaning of the premises?

[22] A: At times, through the period between July [23] 1 and July 15th, Fleming was unable to acquire [24] vendors to perform the services needed. So

Page 88

[1] Fleming's employee, Joe Struempf, requested my [2] assistance to obtain vendors to assist in his [3] management clean-up of this facility as directed [4] by Fleming.

[5] Q: Did you, as the landlord, incur any [6] expenses with regards to the clean-up of the [7] facility in the month of July?

[8] A: I did due to the impaired credit capacity [9] of Fleming.

[10] Q: All right. I'm going to ask you to look [11] in the second exhibit book. And I'll ask you to [12] turn to Exhibit Number 58M as in Mary.

[13] A: I'm there.

[14] Q: Would you identify Exhibit 58M as in Mary [15] for the Court?

[16] A: That is an invoice from Envirowash for [17] services incurred to power wash the interiors of [18] the refrigerated spaces in 5200 and 5150 Kansas [19] Avenue.

[20] Q: And forgive me for being a little dense, [21] but the company's called Envirowash. Is that a [22] special kind of cleaning company?

[23] A: They specialize in the cleaning of food [24] grade facilities.

Page 89

[1] Q: Okay. Were there any problems that [2] developed at the end of June or early July with [3] respect to the floor of the facility in the [4] refrigerated portions of the warehouse?

[5] A: There were. We had a significant mold [6] problem that had arisen due to the increasing [7] temperatures in the refrigerated space. And the [8] warm air

from the ambient temperature outside [9] combined with the general uncleanly condition of [10] food that remained in these freezers. And that [11] mold was an ongoing problem which concerned us [12] greatly.

[13] Q: And was the power washing that's [14] reflected in the Envirowash invoice, which is 58M [15] as in Mary, incurred as a necessary expense to [16] power clean those floors to address the mold [17] issue?

[18] A: Well, the services — Envirowash were [19] contracted by Joe Struempf, Fleming's employee, [20] and he negotiated these services be provided and [21] billed to Intermobile Marketing.

[22] Q: Now, is it fair to say that the facility [23] was not broom clean on July 1st?

[24] A: Very, very fair to say that.

Page 90

[1] Q: But it is now?

[2] A: It is now.

[3] Q: Okay. During the month of July, did [4] Intermobile Marketing incur expenses on behalf of [5] DEC and Shield with respect to these properties?

[6] A: They did.

[7] Q: If you'll turn to the beginning of the [8] Exhibit 38, there is a one-page document, which is [9] Exhibit 38, under of the tabs.

[10] Would you identify this exhibit to [11] the Court?

[12] A: This is a listing of vendors and amounts [13] that were incurred by Intermobile Marketing for [14] the benefit of DEC and Shield for services during [15] the months of June, July, and August.

[16] Q: Okay. We'll come back to legal fees a [17] little bit later.

[18] I see a bill dated June 3rd, 2003 or [19] an item references 7/3/2003, Board of Public [20] Utilities, water, and then an amount of \$86.84. [21] What does that represent?

[22] A: That would have been water charges at one [23] of the facilities for storing water underneath [24] those contracts for 5200 or 5150.

Page 91

[1] Q: And if you'll turn to 58A, is that an [2] invoice or billing statement from Kansas City [3] Board of Public Utilities in the amount of, [4] \$86.84, that then corresponds to that item on your [5] chart?

[6] A: That is correct.

[7] Q: The next item 732,000, Board of Public [8] Utilities, another \$86.84.

[9] Is that a separate invoice?

[10] A: It is.

[11] Q: Okay. And does that correspond to Exhibit [12] 58B as in boy?

[13] A: It does.

[14] Q: Again, that was a utility service [15] incurred you, paid by Intermobile Marketing for [16] those properties on July 3rd?

[17] A: Yeah. Customer's name is Shield [18] Investments.

[19] Q: Okay. Item — next item on your list of [20] 58, there's something that's identified as Backus [21] Lawn Service, \$385.00.

[22] What does that represent?

[23] A: That's lawn services rendered in 2003.

[24] Q: Is that a care and maintenance issue with

Page 92

[1] respect to the properties?

[2] A: It is.

[3] Q: What was the amount of that charge?

[4] A: \$385.

[5] Q: And does that correspond to what is [6] represented as Document Number 58C as in charms?

[7] A: It does.

[8] Q: Moving down the list, I see two locksmith [9] bills.

[10] A: Mm-hmm.

[11] Q: One in the amount of \$203.23 and one in [12] the amount of \$661.50?

[13] A: That's correct.

[14] Q: Can you explain to the Court how those [15] bills arose?

[16] A: On or about June 30th, at about midnight, [17] Fleming vacated the property by releasing the [18] personnel security services that were maintained [19] at the facility.

[20] On or about 7:00 a.m. the next [21] morning, I arrived at the facility. Joe Struempf, [22] Fleming's employee, was there.

[23] He indicated that the guard service [24] had been terminated by Fleming, and that the

Page 93

[1] facility was not secured. There was as many as [2] five different doors that didn't even possess [3] locks.

[4] Q: Now, did you communicate with the [5] Shadrall landlord with respect to cost of the [6] locksmith?

[7] A: I did notify them that there was cost of [8] a locksmith. Joe Struempf, at that point, had [9] discussions with Fleming personnel.

[10] They indicated that they needed to [11] secure the property at that point. Joe

called a [12] vendor in which he maintained a relationship [13] through Fleming.

[14] The vendor wouldn't respond.

[15] Q: Did Mr. Struempf ask Intermobile [16] Marketing to lend its credit for purposes of [17] getting a locksmith out to the property?

[18] A: That's correct. I identified Smallwood [19] as a vendor that would respond if he called them.

[20] Q: And who did Smallwood Locksmith deliver [21] the keys to after rekeying the facility?

[22] A: Fleming employee, Joe Struempf.

[23] Q: Which of these two bills relates to the [24] Shadrall facility? And these are moving forward

Page 94

[1] in the exhibits, I'm sorry.

[2] No exhibit. Do you recall whether [3] one of those bills was related to the Shadrall [4] facility?

[5] A: I do. The \$661 was related to 5300, and [6] the 203 was related to the 52 — 5100 building.

[7] Q: So only the 203.23 was incurred on behalf [8] of Shield and DEC?

[9] A: Well, I believe both bills, to some [10] extent, were incurred on behalf of DEC and Shield. [11] because there's no internal security between the [12] master links. So if you don't secure the 5300 [13] property, you have no security at the 52, or the [14] 5100 property.

[15] Q: Okay. Moving forward in exhibit — back [16] to the summary, Exhibit 58, the next item is [17] another Board of Public Utilities in the amount of [18] \$663.

[19] A: Yes, sir.

[20] Q: And does that correspond to Exhibit 58F [21] as in Frank?

[22] A: It does.

[23] Q: Okay. And the next item, Board of Public [24] Utilities for \$663.28.

Page 95

[1] Does that correspond to Exhibit 58G [2] as in George?

[3] A: It does.

[4] Q: Okay. Next item is a cost for DOP. What [5] is that cost?

[6] A: That's the cost of a riding sweeper that [7] was made available for the week July through July [8] 11th.

[9] Q: Okay. And was that for the purpose of [10] cleaning the facility?

[11] A: That's correct. Both Fleming employee, [12] Joe Struempf, and Doug Hudson operated that unit.

[13] Q: Let me just make sure I understand this. [14] You represented the sweeper, but Fleming employees [15]

operated it during the month of July?

[16] A: Joe Struempf contacted DOP, ordered for [17] the sweeper to be delivered for that week, and [18] operated the sweeper, and had the DOP invoice [19] Intermobile due to the fact that their credit had [20] been impaired and was unable to find a vendor to [21] supply.

[22] Q: Okay. Next item on the list is road [23] surveys dated 7/9/2003.

[24] A: Mm-hmm.

Page 96

[1] Q: Is that the cost of the surveys we've [2] been looking at, Exhibit 10 and 11?

[3] A: That is.

[4] Q: And does that correspond with Exhibit 58I [5] as in Ivan?

[6] A: It does.

[7] Q: And for the record, who, in fact, ordered [8] that survey?

[9] A: It says Attention: Mark Benedict.

[10] Q: Okay. Moving again, back to 58, your [11] summary exhibit, there are additional items on [12] 7/11. One for Board of Public utilities for [13] electric.

[14] Does that represent an electric bill [15] on the facility?

[16] A: It does.

[17] Q: What was the amount of that bill?

[18] A: \$1,086.84.

[19] Q: And does that correspond with 5I [20] as in — [20] pardon me, J as in jam?

[21] A: That would be correct.

[22] Q: Okay. And the next item is — looks to [23] be another water bill dated 7/11/2003. What was [24] the amount of that bill?

Page 97

[1] A: \$76.35.

[2] Q: The next one I have to raise my eyebrow [3] at, it's dated 7/15/2003, RSC, Who's RSC?

[4] A: Refrigerated Systems Corp. That is the [5] vendor that had a relationship with Fleming that [6] monitored the refrigeration systems on site via [7] their employee, Kevin Fleisher.

[8] Q: And what is the amount of that bill, sir?

[9] A: \$944.24.

[10] Q: So this was a bill that RSC sent to the [11] landlord even though it was Fleming's contractor?

[12] A: That is correct.

[13] Q: So these are costs that Fleming had not [14] paid at that time?

[15] A: Well, in our agreement with the shut down [16] of the facility, Fleming agreed to pay for these [17] services.

[18] Q: Okay. I believe we've already tal-



ked in [19] part — and pardon me. Does that correspond, [20] then, with 58L as in Larry?

[21] **A:** That is correct.

[22] **Q:** And before I miss it, is 58K as in [23] Kirkpatrick the utility bill that we just [24] discussed for \$76.35?

Page 98

[1] **A:** 58K? That is correct.

[2] **Q:** I believe we've already talked about [3] 58M. Is the Mobile Enviro, and this was an [4] invoice received 7/16/2003?

[5] **A:** That's correct.

[6] **Q:** Okay. Next item on the list is West [7] Material. Would you explain to me what West [8] material is, and what they were doing?

[9] **A:** Those are security doors that had been [10] delivered to the facility that were ordered, in [11] essence, to gain security between Shadrall's [12] property, and 5250, and 5200.

[13] **Q:** What was the cost of that, sir?

[14] **A:** \$10,015.

[15] **Q:** And does that correspond to the invoice [16] that's included in the exhibit book as 58N as in [17] Nancy?

[18] **A:** That's correct.

[19] **Q:** Okay. Continuing to move forward on your [20] summary of Exhibit 58, you have a reference to [21] Southwestern Bell, July 21st, 2003.

[22] **A:** That's correct.

[23] **Q:** What is that bill for, sir?

[24] **A:** That's — those are phone lines that were

Page 99

[1] established subsequent to Fleming terminating its [2] phone service to the facilities on or about [3] July 15th.

[4] **Q:** Are any building systems tied to the [5] phone system?

[6] **A:** I'm sorry. I didn't hear that.

[7] **Q:** Are any building systems tied to the [8] telephone system?

[9] **A:** The main switch enters — allow 50 [10] switches located on 5300, and then subpanels from [11] there.

[12] **Q:** Okay. And is that necessary for the [13] operation of the fire alarm and the burglar alarm?

[14] **A:** Phone systems are required for those.

[15] **Q:** 7/21/2003, I see another bill, RSC 7/21.

[16] **A:** That's correct.

[17] **Q:** \$145.93. Is that another bill that you [18] got from RSC, Fleming's contractor who was to [19] restore the temperature?

[20] **A:** That is correct.

[21] **Q:** Okay. And again, before I get ahead of [22] myself, Exhibit 58O as in opera, is that the [23] telephone bill we just talked about?

[24] **A:** It is.

Page 100

[1] **Q:** And then 58P as in Paul, is that the [2] refrigeration system invoice we just talked about [3] for the \$145.93?

[4] **A:** That's correct. The invoice and the work [5] order.

[6] **Q:** Okay. Next item on your summary list, [7] Mr. Malinee, on Exhibit 58 is a Ferrellgas bill, [8] What is that?

[9] **A:** That was propane that was used to operate [10] the sweepers and scrubbers.

[11] **THE COURT:** Excuse me, what?

[12] **THE WITNESS:** Operate the sweepers [13] and scrubbers.

[14] **BY MR. BENEDICT:**

[15] **Q:** Which was necessary for the cleaning of [16] the facility?

[17] **A:** That's correct.

[18] **Q:** And the amount of that propane was \$21?

[19] **A:** \$21.

[20] **Q:** And would that correspond to Exhibit 58Q [21] as in Q-bert?

[22] **A:** It does.

[23] **Q:** Going down your summary exhibit, Exhibit [24] Number 58, Mr. Malinee, there's a Smartway bill

Page 101

[1] from July 28th, 2003.

[2] What is that?

[3] **A:** That's cleaning of floors inside the [4] facilities at 5100 and 5150.

[5] **Q:** Would this be to address the mold issue, [6] Mr. Malinee?

[7] **A:** Yes, in the office areas.

[8] **Q:** Okay. And what was the amount of that [9] bill?

[10] **A:** \$1,239.

[11] **Q:** And does that correspond to Exhibit 58R [12] as in Robert?

[13] **A:** It does.

[14] **Q:** I see another bill on 7/28/2003 from West [15] Materials. Is that a duplication of the one we [16] just looked at on 7/18, or is this a different [17] bill?

[18] **A:** No. It's a duplication.

[19] **Q:** Okay. And lastly we've got an 8/20/2003 [20] charge or invoice from National Fire. Can you [21] explain what that is about?

[22] **A:** This is in reference to a service call [23] that was requested by Joe Struempfler to service the [24] fire suppression system as it pertains to an air

Page 102

[1] compressor at the facility at 5100.

[2] **MR. BENEDICT:** And before I [3] continue with any questions on that, may I confer [4] with debtors' counsel for a minute, Your Honor.

[5] **THE COURT:** Yes.

[6] **MR. BENEDICT:** If it please the [7] Court, I'm not going to ask Mr. Malinee questions [8] with regards to this incident. The Debtors have [9] indicated that they will pay this invoice and the [10] repair to the sprinkler system that was identified [11] in the July 27th walk through.

[12] And can I have counsel, for the [13] record, acknowledge that agreement?

[14] **MR. FRYE:** Steven Frye, for the [15] Debtors. Yes, we have agreed to that.

[16] **THE COURT:** All right.

[17] **BY MR. BENEDICT:**

[18] **Q:** Mr. Malinee, are the documents that we've [19] identified as exhibits, in Exhibit 58A down [20] through the numbers we've looked at documents that [21] came from your files?

[22] **A:** They are.

[23] **Q:** Are they true and accurate copies?

[24] **A:** They are true and accurate.

Page 103

[1] **MR. FRYE:** Just for the record, [2] Your Honor, I do note that there are no — I think [3] Mr. Benedict indicated that there are no [4] supporting invoices for the entries under [5] Smallwood Locks.

[6] **MR. BENEDICT:** That is right, Your [7] Honor. We do not have any exhibit on Smallwood [8] Locks in this exhibit book. And for the record, [9] we are not going to ask the Court for the [10] reimbursement of the estate for the locksmith [11] service.

[12] **BY MR. BENEDICT:**

[13] **Q:** Mr. Malinee, we were talking when we [14] first discussed the physical natures of these [15] facilities, about the configuration of the [16] buildings and them being interlinked. In your [17] experience with these buildings, if the Debtor [18] surrenders these — and I'm going to put [19] surrenders in quotes, returns these buildings to [20] you, without restoring the access on the Kansas [21] Highway 32, will Shield have any legal access to [22] the facility?

[23] **A:** It will not.

[24] **Q:** If the estate does not address the

Page 104

[1] interconnect by placing a fire wall between the [2] Shadrall facility and the Shield facility, will [3] Shield be able to lease the building to your — [4] again, I'm

asking you to give me your opinion.

[5] A: Restate the question, I'm sorry.

[6] Q: It was a poor question. That happens. [7] Jet lag, I apologize.

[8] You've identified issues of security [9] between the two buildings, the Shadrall facility [10] and the Shield facility?

[11] A: That is correct.

[12] Q: Okay. If someone were to lease the [13] Shadrall facility, —

[14] A: Okay.

[15] Q: — and store flammable materials aerosol [16] spray cans, for example, what impact would that [17] have on your use of the Shield facility based on [18] the existing configuration of these buildings?

[19] A: Well, due to the nature of the [20] construction, the master links were installed and [21] tied to the eastern wall of the Shadrall [22] facility. There was not a fire wall established [23] in the construction of that wall as identified in [24] those pictures. It does not meet the fire rating

Page 105

[1] code.

[2] So thereby, any insurance rating [3] that Shield was attempting to receive on their [4] facility would be predicated on the products [5] stored in Shadrall's facility. For example, if we [6] were storing food grade material in 5200, and [7] Shadrall was storing fertilizer, our buildings [8] would be rated from an insurance standpoint with [9] the highest degree of risk to the insurance [10] company, which would be the fertilizer.

[11] That's simply because there is not a [12] fire wall that exists between those two [13] facilities. So they're integrated and would have [14] to be graded as one facility.

[15] Q: And does the landlord at this time ask [16] the Debtor to install a fire wall between the [17] Shield and the Shadrall facility?

[18] A: I believe that would be appropriate.

[19] Q: To build such a fire wall, will you need [20] access to both sides of the property line?

[21] A: I believe so.

[22] Q: Do you have access to the Shadrall [23] facility, legal access to the Shadrall facility?

[24] A: I do not.

Page 106

[1] Q: Do you have an easement over the Shadrall [2] facility to access you to the highway?

[3] A: Not to the best of my knowledge.

[4] Q: And you've not been involved in [5] negotiation of such an easement?

[6] A: Absolutely not.

[7] Q: So to your knowledge, has the Debtor [8] obtained such an easement?

[9] A: Not to my knowledge.

[10] Q: And I don't know if it's an issue, but [11] I'm going to ask you a few questions at the [12] commencement of the lease, do you know if there [13] was a median on Kansas Highway 32 in this 5100 [14] block?

[15] A: There was.

[16] Q: I will ask you, Mr. Malinee, again, [17] we're in the second exhibit book, to turn to [18] Exhibit Number 53, if you can identify what that [19] is.

[20] THE COURT: What is the exhibit [21] number?

[22] MR. BENEDICT: Exhibit Number 53.

[23] A: That's an aerial photograph of Kansas [24] Avenue which depicts the Fleming facilities at

Page 107

[1] 5300, 5200 and 5150.

[2] Q: And was this from your construction files [3] kept in the ordinary course of your business?

[4] A: No, sir. It was provided by road [5] survey.

[6] Q: This is dated 1994?

[7] A: That is correct.

[8] Q: How many access points are there on the [9] Shadrall facility as reflected in this photograph?

[10] A: Three.

[11] Q: How many access points are there [12] identified to the Shadrall facility?

[13] A: One.

[14] Q: It's a very poor photocopy that I've [15] received, but is there a median reflected in '94?

[16] A: There is a median cut at the Shadrall [17] property if that's what you are saying.

[18] Q: Okay. But there was a median on Kansas [19] Highway 32?

[20] A: That's correct.

[21] Q: Okay. Mr. Malinee, I'll ask you to turn [22] to Exhibit 50, 5-0.

[23] A: 50.

[24] Q: Are you there, sir?

Page 108

[1] A: I believe I am.

[2] Q: Okay. Can you identify to the Court what [3] Exhibit 50 is, 5-0?

[4] A: I turned to 59. That wasn't what you [5] were asking.

[6] Q: No, Exhibit 50. 5-0.

[7] A: 50, okay. I am there.

[8] MR. BENEDICT: If it please the [9] Court, may I approach and put up another blowup?

[10] THE COURT: Yes.

[11] MR. BENEDICT: Thank you, Your [12] Honor.

[13] BY MR. BENEDICT:

[14] Q: Mr. Malinee, could you identify this [15] exhibit for the Court?

[16] A: It's a Kansas Department of [17] Transportation survey that was done on or about [18] 1996.

[19] Q: Okay. In the middle of the page, and if [20] I may indicate on the exhibit, this block right [21] here.

[22] Can Debtors' counsel see?

[23] MR. ORGEL: Yes. Thank you.

[24] MR. FRYE: Yes.

Page 109

[1] BY MR. BENEDICT:

[2] Q: Would you read to the Court the third [3] line of this box?

[4] A: Its specifically states, close existing [5] median break, construct concrete median.

[6] Q: So does this reflect that there was an [7] existing median cut at least as late as 1996 for [8] the benefit of the Shadrall facility?

[9] A: That is correct.

[10] Q: Is there also a proposal with respect to [11] the access point, which is immediately north of [12] that — let me rephrase that. As of 1996, had [13] they already closed up the Shield curb path?

[14] A: Not on the date of this drawing. This [15] drawing identifies the desire to close the Shield [16] entrance off of K 32, not their property.

[17] Q: Mr. Malinee, did the landlord receive [18] prior written requests from the Debtor to close [19] your access?

[20] A: Not to the best of my knowledge.

[21] Q: And that was required by the Shield [22] lease, 5200, was it not, as we had identified in [23] Paragraph 5.4.1?

[24] A: That is correct.

Page 110

[1] Q: Did they ask your permission to install a [2] new roof?

[3] A: Under 5150.

[4] Q: On 5150.

[5] A: No, sir.

[6] Q: Mr. Malinee, just to put a bookend here [7] on the examination, if the Debtors are allowed to [8] reject the lease and return, for lack of a better [9] term, this property to you in an as-is condition, [10] will Shield have any beneficial use of

that [11] property?

[12] **A:** Absolutely not.

[13] **Q:** And why not?

[14] **A:** They have no legal access to the [15] facility.

[16] **Q:** And isn't it true, also, that Shadrall [17] has control to your building systems?

[18] **A:** That is correct.

[19] **MR. BENEDICT:** No further [20] questions.

[21] **THE COURT:** You want to cross?

[22] **MR. FRYE:** Good morning, Your [23] Honor.

Page 111

# **CROSS-EXAMINATION**

[2] **BY MR. FRYE:**

[3] **Q:** Good morning, Mr. Malinee.

[4] **A:** Good morning, Mr. Frye.

[5] **Q:** Mr. Malinee, who is Hannon? Is it Hannon [6] Wedlin?

[7] **A:** Hannon D. Wedlin?

[8] **Q:** Yes, Hannon D. Wedlin.

[9] **A:** Mm-hmm.

[10] **Q:** Who is he, sir?

[11] **A:** An individual that died in December of [12] 1994.

[13] **Q:** And was he at one point the owner of DEC [14] Investments, LLC?

[15] **A:** He was never the owner of DEC [16] Investments, LLC.

[17] **Q:** What was his relationship, to your [18] knowledge, to that company?

[19] **A:** To DEC Investments, LLC?

[20] **Q:** Yes, sir.

[21] **A:** There was no relationship.

[22] **Q:** Okay. So you have no idea of why Fleming [23] would address DEC Investments care of Hannon D. [24] Wedlin?

Page 112

[1] **A:** The original lease would have identified [2] Mr. Wedlin as one of the people to correspond [3] with.

[4] **Q:** But in your experience at DEC, you didn't [5] have any experience with Mr. Wedlin; is that [6] correct?

[7] **A:** That is not correct.

[8] **Q:** Okay. What was your experience with [9] Mr. Wedlin with regard to the DEC Investments?

[10] **A:** You're confusing me with your questions.

[11] **Q:** I'm sorry. What was your experience with [12] regard to Mr. Wedlin with regard to this lease at [13] Kansas Avenue for the facility owned by DEC [14] Investments?

[15] You said he was a person.

[16] **A:** You're speaking of DEC Inves-

tments, LLC [17] in —

[18] **Q:** Yes, sir.

[19] **A:** I don't believe DEC Investments, LLC [20] existed until after his death.

[21] **Q:** Okay. When did that come into existence, [22] then, to your knowledge?

[23] **A:** His death occurred on December —

[24] **Q:** No. I'm sorry.

Page 113

[1] **A:** — 8th, 1994.

[2] **Q:** And then when was DEC Investments, LLC [3] formed?

[4] **A:** I have no knowledge of that.

[5] **Q:** That is now the owner of the property at [6] 5200 and 5150 Kansas Avenue; is that correct?

[7] **A:** That is correct.

[8] **Q:** All right. And do you know who David [9] Wedlin is?

[10] **A:** I believe he'd be the son of Mr. Wedlin.

[11] **Q:** And what is his relationship, to your [12] knowledge, to Shield Investment Company, LLC?

[13] **A:** I'm not aware of his relationship to that [14] entity.

[15] **Q:** Who owns Shield Investments?

[16] **A:** I don't know who owns Shield Investments, [17] LLC, if that's what your question is.

[18] **Q:** That was my question. Who do you report [19] to when you deal with issues related to the Shield [20] property, that is, the 51, or excuse me, 5200 [21] Kansas Avenue facility?

[22] **A:** I report to a Board of Directors of [23] Intermobile Marketing.

[24] **Q:** And do you know who they then report to

Page 114

[1] at Shield Investment Company?

[2] **A:** I do not.

[3] **Q:** So —

[4] **A:** I do not know the ownership of Shield [5] Investment, LLC, the specific ownership, if that's [6] what you're asking me.

[7] **Q:** I'm asking if you have any relationship [8] with anyone at Shield Investment Company, LLC [9] other than through the Board of Directors at your [10] company?

[11] **A:** I report to the Board of Directors at [12] Intermobile Marketing, Inc.

[13] **Q:** And you have no idea of who represents [14] the Shield Investment Company, LLC, vis-a-vis your [15] Board of Directors?

[16] **A:** I do not know who that is, the specific [17] ownership of Shield In-

vestment, LLC, if that's the [18] question you're asking.

[19] **Q:** No. That wasn't the question I was [20] asking.

[21] **A:** Okay.

[22] **Q:** If you know who at Shield Investment [23] Company, your Board of Trustees

[24] **A:** Okay.

Page 115

[1] **Q:** — Interacts with the Board of Trustee. [2] Your Board of directors, as I understand it, is [3] for the management company that manages the [4] property at 5200 Kansas Avenue; is that correct?

[5] **A:** Intermobile Marketing, Inc. Correct.

[6] **Q:** And they manage that property on behalf [7] of the owner of the property, which is Shield [8] Investment; is that correct?

[9] **A:** That is correct.

[10] **Q:** And who, to your knowledge, does its [11] Board of Directors interact with? Who is the face [12] of Shield Investment Company vis-a-vis your Board [13] of directors, if you know?

[14] **A:** I don't know.

[15] **Q:** So you didn't — you personally don't [16] deal with anyone at Shield Investment Company; is [17] that correct?

[18] **A:** I report — I report to the Board of [19] Directors of Intermobile Marketing, Inc.

[20] **Q:** Let me ask the question again.

[21] **MR. BENEDICT:** I'm going to object [22] because it's been asked and answered.

[23] **THE COURT:** Overruled.

[24] **BY MR. FRYE:**

Page 116

[1] **Q:** I'm not asking you about your Board of [2] Directors, I'm asking do you interact with anyone [3] affiliated with Shield Investment Company?

[4] **A:** I guess my answer is I — I interact with [5] the Board of Directors of Intermobile Marketing. [6] Okay.

[7] **Q:** Is that a no?

[8] **A:** That Board of Directors, I assume, [9] interacts with Shield Investment, LLC.

[10] **Q:** Okay. So your answer to my question, [11] then, is no you don't interact with anyone at [12] Shield Investment Company vis-a-vis these [13] properties, you personally; is that correct?

[14] **A:** I'm confused.

[15] **Q:** You say you interact with Board of [16] Directors, and I understand your answer. I'm [17] asking you if you personally interact with anyone [18] at Shield

Investment Company?

[19] **A:** No, I interact with the Board of [20] Directors of Intermobile Marketing, Inc.

[21] **Q:** Exclusively?

[22] **A:** That's correct.

[23] **Q:** Vis-a-vis the 5200 property?

[24] **A:** To the best of my knowledge, that's

Page 117

[1] correct.

[2] **Q:** With whom, if anyone, at DEC Investments, [3] LLC do you interact vis-a-vis the 5100 Kansas [4] Avenue property?

[5] **A:** It is consistent with what I've testified [6] with Shield. I report to Board of Directors of [7] Intermobile marketing Inc., and that board may [8] interact with DEC.

[9] But I don't specifically interact [10] with DEC.

[11] **Q:** So you have no knowledge?

[12] **A:** I see — I don't know who owns it.

[13] **Q:** You have no idea who owns DEC [14] Investments, LLC?

[15] **A:** Not as I sit here, sir.

[16] **Q:** You don't have any idea who owns Shield [17] Investment Company?

[18] **A:** I do not.

[19] **Q:** Now, Mr. Malinee, just a point of [20] clarification, you testified on direct that the, [21] we'll call it the walk through with Mr. Apadocka [22] and the other representatives of Fleming that [23] occurred in late July, I believe you testified was [24] July 27th, which is, in fact, a Sunday.

Page 118

[1] Did that actually occur on a Sunday?

[2] **A:** No. It would have been a Monday.

[3] **Q:** So that would have been the 28th?

[4] **A:** That would have been accurate.

[5] **Q:** Okay. I just wanted to make sure I got [6] that right.

[7] **A:** If I —

[8] **Q:** Okay. Now, you went through in your [9] exhibit books. You can turn to them if you want, [10] exhibits beginning with Exhibit 14. Excuse me, [11] Exhibit 15, and you went through a series of [12] pictures of the property at 5100 Kansas Avenue and [13] 5200 Kansas Avenue as it existed on July 1st 2003 [14] and on June 30th, 2003.

[15] Am I correct? That's what those [16] pictures represent?

[17] **A:** That's correct.

[18] **Q:** However, as of July 31st, 2003, those [19] items reflected in those pictures have been [20] removed, for example, the forklift; is that [21] correct?

[22] **A:** I believe I testified to that, yes.

[23] **Q:** Yes. And what you — that canister we [24] saw sitting there, that's also been removed?

Page 119

[1] **A:** What canister?

[2] **Q:** I believe it's on Exhibit 15.

[3] **A:** I believe 15 is a picture of forklifts [4] and a trailer.

[5] **Q:** I'm sorry. One moment, please.

[6] You are correct. It's Exhibit 16. [7] Do you see those canisters there?

[8] **A:** Those propane tanks?

[9] **Q:** Propane tanks, is that what those are?

[10] **A:** That's what they are.

[11] **Q:** I take it as of July 31st, those have [12] been removed; is that correct?

[13] **A:** I believe they have.

[14] **Q:** And the forklift or sweeper, whatever is [15] the lower picture on Exhibit 16, that has been [16] removed as well; is that correct?

[17] **A:** I believe it has.

[18] **Q:** And on Exhibit 17, the two forklifts [19] represented by the top picture, and the forklift [20] represented on the bottom picture, those have also [21] been removed as of July 31st; is that correct?

[22] **A:** From DEC and Shield's property?

[23] **Q:** Yes.

[24] **A:** Yes.

Page 120

[1] **Q:** And Exhibit 18, the top picture seems to [2] be a forklift, and the bottom picture seems to be [3] some sort of other industrial machine. As of July [4] 31st, I take it those have been removed as well; [5] isn't that correct?

[6] **A:** From DEC and Shield's property?

[7] **Q:** Yes, sir.

[8] **A:** Yes.

[9] **Q:** And the debris that's identified on the [10] pictures of Exhibit 19, I believe you testified [11] that that is from the DEC property; is that [12] correct?

[13] **A:** That's — this would have been in the [14] building 5100 Kansas Avenue, so that would be DEC.

[15] **Q:** Right. And as of July 31st, 2003, those [16] have been removed, I take it; is that correct, or [17] it's been cleaned?

[18] **A:** I would agree with that.

[19] **Q:** These items no longer appear on the floor [20] of the 5100 building; is that correct?

[21] **A:** I would agree with that.

[22] **Q:** On Exhibit 20, I believe you testified — [23] which building is this, again, with the pictures [24] on Exhibit 20?

Page 121

[1] **A:** The top picture is Building 5150. And [2] the bottom picture is 5100.

[3] **Q:** So those are both owned by DEC, right?

[4] **A:** They are.

[5] **Q:** And as of July 31st, 2003, the forklift [6] that you see on the top picture is no longer at [7] the 5150 building, is it?

[8] **A:** It is not.

[9] **Q:** And this debris, for want of a better [10] term that we see scattered on the floor of the [11] 5100 building as of June 30th, 2003 is no longer [12] there as of July 31st, 2003; is that correct?

[13] **A:** That is correct.

[14] **Q:** And on Exhibit 21, the items that are [15] stacked at — now, strike that.

[16] Which facility is represented in the [17] top picture of Exhibit 21?

[18] **A:** 51 — 5100.

[19] **Q:** And is the bottom picture also 5100?

[20] **A:** It is.

[21] **Q:** And as of July 31st, 2003, the items both [22] on the top and bottom of the picture are no longer [23] at the 5200 facility, are they?

[24] **A:** That is correct.

Page 122

[1] **Q:** And finally, on Exhibit 22, which [2] facility is represented in these pictures?

[3] **A:** Top picture is 5150. The bottom picture [4] is 5100.

[5] **Q:** And as of July 31st, the forklifts and [6] other industrial machinery that are identified in [7] those pictures have been removed from those [8] facilities, have they not?

[9] **A:** I believe that's correct.

[10] **Q:** Now, I believe you testified that Fleming [11] paid the rent for July, 2003; is that correct?

[12] **A:** I believe they were ordered by the Court [13] to pay that rent. I believe that rent was paid on [14] July 24th.

[15] **Q:** Now, I believe that your exhibit, it was [16] Exhibit 58 in the new exhibit book, there was an [17] invoice there for change of locks from a Smallwood [18] Lock Company?

[19] **THE COURT:** Did we stipulate [20] they're not asking for that?

[21] **MR. FRYE:** Yes, we did.

[22] **THE COURT:** Let's not waste time.

[23] **BY MR. FRYE:**

[24] **Q:** Okay. My question was: You have a set

Page 123

[1] of keys to the locks, do you not, Mr.

Malinee I [2] believe that was your testimony [3] is that correct?

[4] A: I believe I testified that Joe Struempf [5] on or about July 1st or 2ND provided me a set of [6] keys to the facility at 5200 and 5100.

[7] Q: Do you still have those keys?

[8] A: In my possession here, no.

[9] Q: Do you have them somewhere you can access [10] them if need be to go to the facilities?

[11] A: I do.

[12] Q: Now, with regard to the items you have [13] identified in the exhibit book in Exhibit 58, the [14] various invoices that were incurred in July, [15] Fleming worked with, which had paid for July work [16] with you to make sure, for example, that the [17] facility was cleaned by Envirowash [18] isn't that correct?

[19] A: I don't think I understand the question, [20] Steve.

[21] Q: I believe you testified that Mr. Struempf [22] and maybe another gentleman on July 8th or 9th, [23] whenever that invoice is dated from Envirowash —

[24] A: Which invoice, Steve?

Page 124

[1] Q: I'll point and direct you to it.

[2] MR. BENEDICT: 58M.

[3] BY MR. FRYE:

[4] Q: It's 58M, sir.

[5] A: Okay. I'm with you.

[6] Q: So you got — they assisted Envirowash in [7] cleaning the building, did they not?

[8] A: They managed Envirowash cleaning this [9] facility.

[10] Q: They managed them?

[11] A: Yeah.

[12] Q: What do you mean by "managed them", sir?

[13] A: They worked and directed them around.

[14] Q: So Fleming provided no resistance to [15] having the building cleaned. They — in fact, [16] they directed and managed them; correct?

[17] A: Other than the fact that they didn't lend [18] their credit to it.

[19] Q: Is your answer yes to my question?

[20] A: I think my answer is that we provided [21] credit support for Fleming to accomplish that [22] task.

[23] Q: But my question was: Fleming assisted [24] Envirowash in cleaning the building. I believe

Page 125

[1] you testified they managed it; correct?

[2] A: They were — they worked arm in

arm with [3] Envirowash if that's what you're asking.

[4] Q: Yes, sir. I'll direct your attention to [5] Exhibit 58O. I take it that you are requesting [6] that the estate reimburse Intermobile Marketing [7] for the costs incurred with regard to the phone [8] service.

[9] Am I correct in that?

[10] A: These bills represent the establishment [11] of phone service to the facility at 5150 that [12] monitors the ammonia system contained in the [13] retaining vessels.

[14] Q: I understand that, but my question was: [15] Intermobile has paid this bill; is that correct?

[16] A: Intermobile has been invoiced, I can't [17] tell if you it's been paid, Mr. Frye.

[18] Q: So it may or may not have been paid; [19] correct?

[20] A: It may be an open payable item at this [21] point in time.

[22] Q: And am I — to refer you to my original [23] question: Is DEC, and/or Shield, and or [24] Intermobile requesting reimbursement from the

Page 126

[1] Debtors for this bill?

[2] A: That is correct.

[3] Q: Okay. But the bill is for service, and [4] in addition to having it turned on, it's also for [5] service into August, is it not?

[6] I'll direct you to Page 30, sir, [7] where it says billing for SCC.

[8] A: August, July 23rd to August 20th?

[9] Q: Yes.

[10] A: That's what it says under monthly [11] charge.

[12] Q: So the bill at least for the phone [13] service is for July and August; isn't that [14] correct?

[15] A: It would appear that it extends both [16] those periods, if that's what you're asking.

[17] Q: And I'll direct your attention to Exhibit [18] 58G. I believe you testified that was a utility [19] bill that went to DEC Investments; isn't that [20] correct?

[21] A: That's correct.

[22] Q: And for which property is this bill?

[23] A: Service location is identified as 5150 [24] Kansas Avenue.

Page 127

[1] Q: And you — it's — if you read to the [2] right of the page at the top service from 7/7/03 [3] to 8/13/03; isn't that correct?

[4] A: That appears to be correct.

[5] Q: So it was service not only for the first [6] 20 something days of July, 24 days

or the last 24 [7] days of July, but also first 13 days of August; [8] correct?

[9] A: That's correct.

[10] Q: Now, I believe you testified that the [11] doors that are represented by the West Material [12] invoices, how many doors are there that were [13] purchased pursuant to that invoice?

[14] A: Two.

[15] Q: And where were — have those doors been [16] installed?

[17] A: No, sir.

[18] Q: So they are — they were purchased by [19] which company?

[20] A: I believe that they were — invoiced [21] Intermobile Marketing.

[22] Q: And where does Intermobile Marketing [23] intend to install those doors?

[24] A: Those would be installed on the west end

Page 128

[1] of the master links, north and south.

[2] Q: The master links that connect the [3] Shadrall property to the Shield property; is that [4] correct?

[5] A: That's correct.

[6] Q: But you testified that those doors have [7] not yet been installed; is that correct?

[8] A: No. No, they're sitting on the dock.

[9] Q: On the Shield property?

[10] A: Well, it's in the master link. I can't [11] tell you if it's on the east or west side of that [12] line, imaginary line.

[13] It's on the south master link is [14] where they're sitting.

[15] Q: Within somewhere in the south master [16] link?

[17] A: That's correct.

[18] Q: Now, to your knowledge, were the 5100 and [19] the 5200 buildings ever commonly owned?

[20] A: The 5100 and the 5200 buildings commonly [21] owned? No, they were not.

[22] Q: They've always been owned by separate [23] owners, to your knowledge?

[24] A: Entities, correct.

Page 129

[1] Q: Right. To your knowledge, did [2] Mr. Wedlin, the gentleman you identified in 1994 [3] or has passed away as of 1994, did he perform the [4] services you performed with regard to the 5100 and [5] 5200 Kansas Avenue facilities?

[6] A: No, sir.

[7] Q: What was his relationship, if any, to [8] those properties, to your knowledge?

[9] A: Well, prior to his death, he would have [10] been listed as a general partner

of Shield.

[11] Q: Was he ever, to your knowledge, [12] affiliated with DEC?

[13] A: I believe prior to his death, he was the [14] general partner of DEC.

[15] Q: And the general partner of Shield?

[16] A: That is correct.

[17] Q: But as you sit here today, you can't tell [18] us who owns DEC, LLC and Shield Investment [19] Company; is that correct?

[20] A: That is correct. That is not information. [21] I need to perform my duties.

[22] Q: Now, let's talk a little bit about the [23] roof, Mr. Malince. I understand that shortly [24] after the bankruptcy petition was filed, that you

Page 130

[1] received a proposal from D.C. Taylor, the roofing [2] company as to how much it would cost to complete [3] the work on the roof at 5150, did you not?

[4] A: I did. I requested a proposal, so I [5] could identify the economic values. And you [6] requested that from Mr. Larry Stein at D.C. [7] Taylor?

[8] A: That is correct.

[9] Q: And why did you go then to D.C. Taylor to [10] request that information?

[11] A: Well, in my discussions with [12] Mr. Stegmann, he indicated —

[13] Q: Who's he, Mr. Stegmann?

[14] A: Mr. Stegmann, Fleming's employee, [15] indicated that the roof had been paid for up and [16] through the temporary termination line.

[17] So I was trying to determine how [18] much roof was left to be completed since the [19] temporary termination line was not contemplated in [20] the contract. Larry Stein provided me a proposal [21] that indicated that there was 17,000 square feet [22] left to be graphed, and that that cost was [23] somewhere in the range of 93 to \$98,000.

[24] Q: Did you — did Mr. Stein, excuse me.

Page 131

[1] Mr. Stein offered after the arrangement on June [2] the 26th, 2003 to recaulk the termination line [3] where that had been tied off, did he not?

[4] MR. BENEDICT: I am sorry. Could [5] counsel restate the question? I missed the first [6] part of that.

[7] BY MR. FRYE:

[8] Q: Okay. Mr. Stein of D.C. Taylor offered [9] to recaulk the termination line at the point where [10] it was leaking following the rain on June 26th, [11] did he not?

[12] MR. BENEDICT: And I'm going to [13]

object to the extent counsel is providing hearsay [14] testimony from Mr. Stein.

[15] THE COURT: Why isn't it hearsay?

[16] MR. FRYE: Well, Your Honor, I'm [17] not offering to prove the truth of the matter [18] asserted. I'm asking whether he was — that this [19] gentleman offers —

[20] THE COURT: Why is it being offered [21] then?

[22] MR. FRYE: Our position, Your [23] Honor, is that the roofing company, and we can get [24] into the testimony of the roofer if we need to.

Page 132

[1] He was asked about this in his deposition. I'm [2] simply asking Mr. —

[3] THE COURT: Well, it's still [4] hearsay. If you're not trying to prove the truth [5] of it, what are you trying to prove?

[6] MR. ORGEL: Excuse me, Your Honor. [7] It's entirely relevant to —

[8] MR. BENEDICT: I think one counsel [9] at a time. Mr. Frye is handling this witness. I [10] don't think I should be double teamed here.

[11] THE COURT: All right. I'll hear [12] from Mr. Frye.

[13] MR. FRYE: Well, it's relevant, [14] Your Honor, to whether he believed that there was [15] an offer to fix the roof and what he did in [16] response thereto.

[17] THE COURT: Well, why is his belief [18] relevant? You can ask him what he's done, but I [19] don't think you can ask him what someone else has [20] told him.

[21] MR. FRYE: Fair enough, Your Honor. [22] I'll move on.

[23] BY MR. FRYE:

[24] Q: I believe you testified that you were not

Page 133

[1] at the facility on July 2nd, 2003 when D.C. Taylor [2] visited the roof at 5150; is that correct?

[3] A: I was unaware that they visited the roof [4] on this day, and I was not present during their [5] visit.

[6] Q: When did you learn about that?

[7] A: It wasn't until I provided a copy of [8] Blackburn's letter to Joe Struempf. And he [9] informed me that D.C. Taylor had visited the [10] property and reviewed it.

[11] Q: And do you recall what date that was, the [12] date of the report?

[13] A: The date of the report or the date I [14] provided it to Joe Struempf?

[15] Q: No. I'm asking first the date of the [16] report, the Blackburn report.

[17] A: I'd have to look at the date it was [18] issued.

[19] Q: Was it on or about July 9th? Does that [20] sound correct?

[21] A: That could be close.

[22] Q: Okay. And do you know when you provided [23] that to Mr. Struempf?

[24] A: I said I was going to July 9th.

Page 134

[1] Q: Well, was it two weeks later, or was it [2] two or three days later?

[3] A: Probably prior to July 15th.

[4] Q: And did you contact Mr. Stein at D.C. [5] Taylor after you received this report from [6] Blackburn Roofing?

[7] A: I did.

[8] Q: And you discussed with him the [9] conclusions of Mr. Blackburn in his report, did [10] you not?

[11] A: I faxed a copy of the report to Larry [12] Stein for his review.

[13] Q: And did you ask Mr. Stein if he agreed [14] with those conclusions?

[15] A: I did.

[16] Q: And did you then — did you tell [17] Mr. Stein anything else in this conversation that [18] you had with him after this about the Blackburn [19] report?

[20] A: In the conversation with Stein, asked [21] him if he had received my fax. He said he had.

[22] I asked him if he had read the [23] report. He said he had.

[24] I asked him if he agreed with the

Page 135

[1] conclusion of the report.

[2] Q: Which conclusion?

[3] A: The conclusion that the only way to [4] eliminate the leaks in the temporary termination [5] line was via the completion of the roof due to the [6] incompatibility of the materials that were [7] adjoining the old roof to the new roof. And he [8] indicated that he absolutely agreed.

[9] Q: And then what did you say to him in [10] response to that comment from him?

[11] A: I don't think I said anything to him.

[12] Q: Did you ever tell D.C. Taylor not to fix [13] or caulk the temporary termination line after the [14] rain of June 26th, 2003?

[15] A: No.

[16] Q: Did you tell Mr. Stein that if he agreed [17] with the findings in the Blackburn letter that he [18] should consult with his attorney before doing any [19] work on the roof? Did you tell him that?

[20] A: I told him he ought to consult with his [21] attorney. I don't believe the words before you do [22] any work on the roof were a part of that [23] conversation.

[24] MR. FRYE: Your Honor, may I

Page 136

[1] approach the witness?

[2] THE COURT: Yes.

[3] BY MR. FRYE:

[4] Q: Now, Mr. Malinee, do you recall our —  
[5] the deposition taken in Mr. Benedict's  
office on [6] Tuesday, August 12th, 2003?

[7] A: I do.

[8] Q: And you were the deponent at that  
[9] deposition; correct?

[10] A: I believe that's correct, to my [11]  
knowledge.

[12] Q: And I did — I'm the one who  
asked you [13] the questions, —

[14] A: I believe I was.

[15] Q: — was I not?

[16] Okay. I'm going to refer you to [17]  
Page 134, Line 23 of your deposition.

[18] A: I see it.

[19] Q: Okay. Now, if I could, I asked you:  
So [20] it was your position after your  
discussions with [21] Mr. Stein, based on  
the Blackburn all-star review [22] that you  
didn't want the caulking to be done to  
[23] temporarily fix the leak; is that  
correct?

[24] And you answered: I believe

Page 137

[1] subsequent to my discussions with  
Larry Stein, [2] that if he agreed with the  
findings of that [3] letter, he ought to  
consult his attorney before [4] doing any  
work on the roof.

[5] Wasn't that your answer?

[6] A: I believe that was my answer. But  
that [7] answer is not in the discussion  
that you were [8] asking me about here  
today in court. They were [9] two sep-  
arate discussions.

[10] Q: Is your answer different? Would  
your [11] answer to that question be  
different today than it [12] was on August  
the 12th?

[13] A: No. That's referring to a separate  
[14] discussion. I believe that's accurate.

[15] Q: All right. Now, which discussion  
were [16] you referring to, then, in this —  
in the [17] deposition when you say you  
told Mr. Stein to [18] consult his attorney  
before doing any work on the [19] roof?

[20] A: That particular discussion Mr. Ste-  
in [21] called me. The discussion you —  
we were talking [22] about a couple  
minutes ago was the discussion I [23]  
called Mr. Stein and said had he reviewed  
[24] Blackburn's letter.

Page 138

[1] Q: Okay.

[2] A: You have two different.

[3] Q: They're two different discussions?

I'm [4] sorry.

[5] A: That's okay.

[6] Q: So in the second — do you recall  
when [7] the second discussion was,  
approximately?

[8] A: Sometime the latter part of July.

[9] Q: Now, why did you tell Mr. Stein that  
if [10] he agreed with the findings of the  
Blackburn [11] letter, he ought to consult  
his attorney for doing [12] any work on  
the roof?

[13] A: Because he told me that he wasn't —  
he [14] was trying to get a consensus  
between Fleming and [15] us, and it  
appeared that the recommendations  
that [16] he agreed to per Blackburn  
weren't consistent with [17] Fleming.

[18] And he indicated to me that he [19]  
wanted the consensus of all parties.

[20] Q: And so you told him to consult his  
[21] attorney?

[22] A: That's correct. If he could not get a  
[23] consensus.

[24] THE COURT: How much longer do  
you

Page 139

[1] think you'll be?

[2] MR. FRYE: I don't think I have [3]  
anything. Your Honor, I'm going to  
consult with [4] Mr. Orgel.

[5] BY MR. FRYE:

[6] Q: Okay. A couple final points or areas  
of [7] questions, Mr. Malinee.

[8] Now, with regard to the curb, what [9]  
we call the curb cut that formerly would  
allow [10] access from Kansas Avenue  
into the Shield [11] facility, that curb cut  
was removed at what point, [12] do you  
remember?

[13] A: Sometime subsequent to the  
1960, 1996 [14] construction of the fac-  
ilities, the additions in [15] the curb.

[16] Q: So it was sometime post 1996, but  
it was [17] prior to April 1st, 2003; is that  
correct?

[18] A: I believe that would be fair to say.

[19] Q: Has any work been done at that  
curb cut [20] access site, for want of a  
better term, since the [21] filing of the  
petition on April 1st, 2003 to your [22]  
knowledge?

[23] A: Not to the best of my knowledge.

[24] Q: Now, these master links that we've  
called

Page 140

[1] them that connect the Shadrall facility  
about the [2] Shield facility, those were  
constructed prior to [3] April 1st, 2003,  
were they not?

[4] A: That would be — I would believe  
that [5] that's safe to say. That's correct.

[6] Q: And there have been no work

performed to [7] either erect or tear  
down those master links since [8] the  
filing of the petition on April 1st, 2003,  
has [9] there?

[10] A: I believe that's correct.

[11] Q: And the same with regard to the  
links [12] between the DEC facility at  
5200 Kansas Avenue and [13] 5150 Kan-  
sas Avenue with regard to the links that  
[14] connect those facilities with the  
Shield [15] property. Those connects  
were made prior to April [16] 1st, 2003,  
were they not?

[17] A: Help me out. You made a right  
turn on [18] me.

[19] Q: Okay.

[20] A: You're talking about?

[21] Q: I'm sure it was inartfully phrased. I  
[22] will try again.

[23] I believe we saw on the site map [24]  
that there are interconnects between  
the DEC

Page 141

[1] properties at 5150 Kansas Avenue and  
5100 Kansas [2] Avenue to the Shield  
property at 5200 Kansas [3] Avenue, are  
there not?

[4] A: Yeah. That's correct.

[5] Q: You can access 5200 through 5100  
and [6] 5150; correct?

[7] A: That's — they're two passage ways  
called [8] corridors.

[9] Q: Corridors. Okay.

[10] A: I think that's what we're referring  
to.

[11] Q: Refer to them as corridors. I am  
sorry.

[12] And those corridors were built prior  
[13] to April 1st, 2003, were they not?

[14] A: I believe that's correct.

[15] Q: And there hadn't been any work  
performed [16] vis-a-vis those corridors  
by Fleming since the [17] bankruptcy  
petition on April 1st, 2003, has there, [18]  
to your knowledge?

[19] A: What do you mean as "work"?

[20] Q: They haven't closed them off,  
have they?

[21] A: No.

[22] Q: They haven't made them wider,  
have they?

[23] A: No.

[24] MR. ORGEL: Steve.

Page 142

[1] BY MR. FRYE:

[2] Q: Okay, Mr. Malinee, I believe you [3]  
testified that the only way to access the  
Shield [4] property at 5200 and 5250  
Kansas Avenue as matters [5] presently  
stand is either through the Shadrall [6]  
property or through the DEC property;

am I [7] correct?

[8] **A:** I guess, yeah, if you had a helicopter, [9] you could get there. But on ground, you would [10] have to cross property that is owned by entities [11] other than Shield for which Shield has no legal [12] right.

[13] **Q:** Are you aware that the Shadrall lease has [14] been rejected by Fleming and approved by the [15] Court, and that Fleming no longer has access to [16] the Shadrall property?

[17] **MR. BENEDICT:** I'm going to object [18] as it calls for a legal conclusion as to what is [19] the effect of the rejection of the lease.

[20] **THE COURT:** All right. Sustained.

[21] **MR. FRYE:** I have nothing further, [22] Your Honor.

[23] **THE COURT:** Unless you are going to [24] be five minutes, I think we're going to break.

Page 143

[1] All right. Let's take a break now. [2] We'll come back at 2:00.

[3] Okay. [4] Mr. Malinee, you shouldn't consult [5] with your attorney.

[6] **MR. BENEDICT:** Except about [7] football and baseball, Your Honor.

[8] (A lunch recess was taken.)

[9] **THE CLERK:** Please rise. [10] You may be seated.

[11] **THE COURT:** All right. If the [12] witness would retake the stand.

[13] All right. You're still under [14] oath.

[15] Did the Committee want to [16] cross-examine?

[17] **MR. FOURNIER:** No, Your Honor, the [18] committee has no questions for the witness.

[19] **MR. BENEDICT:** If it please the [20] Court, Your Honor, Mark Benedict for DEC and [21] Shield for redirect.

[22] **BY MR. BENEDICT:**

[23] **Q:** Mr. Malinee, during the [24] cross-examination, Mr. Frye asked you when the

Page 144

[1] rent was paid in the month of July. Do you recall [2] that question?

[3] **A:** I believe I told him that it was on or [4] about July 24th.

[5] **Q:** When was the rent due?

[6] **A:** July 1st.

[7] **Q:** Also, during cross-examination, there was [8] discussion as there was during direct examination [9] of the Blackburn letter. Do you recall that [10] testimony?

[11] **A:** I do.

[12] **Q:** Okay. And in particular, there was

a [13] question on cross-examination with respect to the [14] date you and Mr. Struempf had communications about [15] the Blackburn letter. Do you recall that [16] cross-examination question?

[17] **A:** I do.

[18] **Q:** I'm going to ask you to refer to Exhibit [19] Number 27 in the movant's or DEC and Shield's [20] exhibit book.

[21] **A:** I'm with you.

[22] **Q:** Okay. And I'll represent to you that the [23] first three pages, four pages of that are an [24] affidavit from Mr. Blackburn identifying that

Page 145

[1] these are true and accurate copies. And I'll ask [2] you to turn to page — what I believe is Page 5 of [3] the document moving forward into the document.

[4] And it is a letter Blackburn's All [5] Star Roofing. Are you with me yet?

[6] **A:** Yes. It's dated Monday, July 7th.

[7] **Q:** Okay. Does that refresh your [8] recollection on when you would have had [9] conversations with Mr. Struempf with regards to [10] Mr. Blackburn's conclusions contained in this [11] correspondence?

[12] **A:** It would be subsequent to this date. [13] Correct.

[14] **Q:** Okay. And you say subsequent; a matter [15] of days, a matter of weeks?

[16] We're just trying to pin down, [17] approximately, when that conversation was.

[18] **A:** Well, it would have had to occurred on or [19] before July 15th.

[20] **Q:** So between the 7th and the 15th?

[21] **A:** That's correct.

[22] **Q:** And the conclusions that Mr. Struempf [23] said he agreed with, were those conclusions [24] referenced in this correspondence that the roofs

Page 146

[1] are incompatible and that the only way to fix the [2] roof is to complete the roof.

[3] Are those the conclusions that [4] Mr. Struempf identified as those he agreed with?

[5] **MR. FRYE:** Objection, Your Honor. [6] That mischaracterizes his prior testimony.

[7] I believe Mr. Stein is with D.C. [8] Taylor, not Mr. Struempf.

[9] **MR. BENEDICT:** Fair enough, Your [10] Honor. Withdrawn.

[11] **BY MR. BENEDICT:**

[12] **Q:** Mr. Malinee, Mr. Frye asked you a number [13] of questions with regards to the removal of [14] hazardous materials, forklifts, forklift [15] batteries, drums,

propane tanks, all of those. [16] And I understand that that occurred during the [17] month of July?

[18] **A:** All of that occurred during the month of [19] July with the barrel occurring subsequent to the [20] visit of Danny Apadocka and Mike Ferrish.

[21] **Q:** And that visit we are talking about is [22] the July 28th visit?

[23] **A:** That's correct.

[24] **Q:** Now, I'm going to ask you to turn in your

Page 147

[1] exhibit notebook to Exhibit Number 45.

[2] **A:** Mm hmm.

[3] **Q:** Would you identify to the Court what that [4] exhibit is?

[5] **A:** That is a picture of equipment that was [6] on the property whereby Fleming was overseeing the [7] disposal of this "residual equipment". You've got [8] two forklifts that had been turned over, and they [9] were draining the hydraulic fluid out of those [10] forklifts and disposing of them.

[11] **Q:** Okay. And what is the date of this [12] photograph?

[13] **A:** 7/7.

[14] **Q:** And did you take this photograph, [15] Mr. Malinee?

[16] **A:** I did.

[17] **Q:** Is this a true and accurate depiction of [18] the events you've now described in this photograph [19] on July 7th of '03?

[20] **A:** It is.

[21] **Q:** Okay. And I'll ask you, then, to turn [22] the page to Exhibit Number 46.

[23] **A:** I'm there.

[24] **Q:** Okay. There are two photographs there.

Page 148

[1] and I believe Mr. Frye was asking you whether this [2] barrel, which is the top photograph on July 7th, [3] had been removed. And is this the barrel that was [4] removed subsequent to the Danny Apadocka visit on [5] July 27, July 28th?

[6] **A:** That is correct.

[7] **Q:** Okay. Focusing then on the second [8] picture, which is on Exhibit Number 46, can you [9] tell me what that photograph is?

[10] **A:** It's a photograph consistent with the [11] Exhibit 45. Just from a close-up perspective, [12] that indicates or identifies these forklifts [13] having been turned over and drained.

[14] **Q:** And again, it's very faint on my copy, [15] but does that photograph have a date of July 7th, [16] '03 on it?



[17] A: That is correct.  
 [18] Q: So it's taken the same day as Exhibit 45?  
 [19] A: Within seconds of the prior photograph.  
 [20] Q: Okay. Now, focusing on this, this [21] photograph, and I'll ask you to look at the [22] left hand forklift as you're looking at the [23] photograph.  
 [24] What is the terrain feature?

Page 149

[1] immediately to the left of that forklift between [2] that and the edge of the photograph?  
 [3] A: The pavement at this point on property [4] slope towers. It's a storm drain.  
 [5] Q: So on this date as they were removing [6] this equipment and undertaking their obligations [7] to remove this equipment, they were draining the [8] hydraulic fluids into the storm drain?  
 [9] A: That's what effectively occurred.  
 [10] Q: Okay. Now, Mr. Malinee, and again just [11] to clean up some things from cross-examination, [12] and to a certain extent from direct examination, [13] would you turn to the second exhibit book that we [14] had provided to you to Exhibit Number 65.  
 [15] A: I'm on Exhibit 65.  
 [16] Q: And can you identify that document for [17] the Court?  
 [18] A: This is a letter written by D.C. Taylor [19] on April 14th and signed by Larry Stein.  
 [20] Q: And this was a letter to you, sir?  
 [21] A: That is correct.  
 [22] Q: And during the cross-examination, when [23] you were asked whether Mr. Stein had provided to [24] you a written bid for the completion of the

Page 150

[1] roofing work at 5150, is this the document that [2] was being referred to in your testimony?  
 [3] A: Yeah. This is here in its entirety.  
 [4] That's correct.  
 [5] Q: Okay. And I'll ask you to move forward [6] in that document to the third page.  
 [7] At the top of the page, it [8] identifies D.C. Taylor's bid. An original [9] contract amount of \$292,925. An identification of [10] the square foot per contract.  
 [11] And then if you follow down, there's [12] a number that's identified as the bid to [13] complete. Is that the bid to complete the roof?  
 [14] A: As submitted on the next page by Larry [15] Stein, that's correct.  
 [16] Q: And what is the amount of the cost

to [17] complete the roof?  
 [18] A: \$493,616.  
 [19] Q: Okay. I believe we had talked in [20] generalities, so I just wanted to make sure we [21] identified that document.  
 [22] A: Mm-hmm.  
 [23] MR. BENEDICT: If I may confer with [24] co-counsel, I think I might be done.

Page 151

[1] THE COURT: All right.  
 [2] BY MR. BENEDICT:  
 [3] Q: Mr. Malinee, and again just to clean up [4] the record and make sure everything is clear, you [5] have identified throughout your testimony that [6] you've communicated with Joe Struempf?  
 [7] A: That's correct.  
 [8] Q: And who is Mr. Struempf?  
 [9] A: He's an employee for Fleming, facility [10] manager at the Kansas Distribution Center.  
 [11] Q: All right. Is Mr. Struempf an employee [12] of Intermobile Marketing?  
 [13] A: No.  
 [14] Q: Is Mr. Struempf an employee of DEC [15] Investments?  
 [16] A: No.  
 [17] Q: Is Mr. Struempf an employee of Shield?  
 [18] A: No.  
 [19] Q: Do you have an agreement with [20] Mr. Struempf, either in your passing with DEC [21] Shield or Intermobile Marketing, for his [22] employment in the future?  
 [23] A: Absolutely not.  
 [24] Q: And just again, so the record is clear,

Page 152

[1] has Mr. Struempf, prior to today, at any point in [2] time, been an employee of Intermobile Marketing, [3] DEC, or Shield, to your knowledge?  
 [4] A: Absolutely not.  
 [5] MR. BENEDICT: Thank you. I have [6] no further questions.  
 [7] MR. FRYE: No questions, Your [8] Honor.  
 [9] THE COURT: All right. Thank you. [10] You may step down.  
 [11] MR. BENEDICT: If it please the [12] Court, as our second witness, we would call David [13] Stegmann.  
 [14] THE CLERK: Employees place your [15] hand on the Bible and state your name for the [16] Court.  
 [17] THE WITNESS: David Frederick [18] Stegmann.  
 [19] DAVID F. STEGMANN, [20] the deponent herein, having first [21] been duly

sworn on oath, was [22] examined and testified as follows:  
 [23] THE CLERK: You may be seated.  
 [24] BY MR. BENEDICT:

Page 153

[1] Q: Good morning, Mr. Stegmann, if you would [2] please state your full name for the record, and if [3] you would spell it for the court reporter.  
 [4] A: David Frederick Stegmann. D-A-V-I-D, [5] F-R-E-D-E-R-I-C-K, S-T-E-G-M-A-N-N.  
 [6] Q: And Mr. Stegmann, with whom are you [7] employed?  
 [8] A: Fleming Companies, Inc.  
 [9] Q: And how long have you been employed with [10] Fleming?  
 [11] A: Since 1986.  
 [12] Q: And what is your position with Fleming?  
 [13] A: Director of facility.  
 [14] Q: And what are your — generally your [15] duties as the director of facilities?  
 [16] A: Today?  
 [17] Q: Yes, as of today.  
 [18] A: In charge of the properties group, which [19] is real estate, maintenance, construction. Of [20] course, there's not much of that being done right [21] now. It's mostly bankruptcy issues as far as [22] terminating leases and that sort of thing.  
 [23] Q: And as of April 1st, 2003, the date of [24] the bankruptcy, would your duties have been the

Page 154

[1] same as they are today?  
 [2] A: No. At that time, I wasn't in charge of [3] the properties group.  
 [4] Q: Okay.  
 [5] A: My responsibilities then was [6] environmental construction, capital expenditures, [7] economic development. Those were my — those were [8] my basic functions.  
 [9] Q: Was the maintenance of facilities part of [10] your function at that time?  
 [11] A: Maintenance of? I didn't hear you.  
 [12] Q: Were the maintenance of facilities part [13] of your functions and job duties as of the filing [14] of the bankruptcy on April 1st?  
 [15] A: Yes.  
 [16] Q: And again, starting using the time frame [17] of April 1st, 2003, would the area of your [18] responsibility have included the real properties [19] that we are talking about here today 5100, 5150, [20] 5200 Kansas Avenue?  
 [21] A: For capital expenditures, yes.  
 [22] Q: And maintenance of facilities?

[23] **A:** Maintenance indirectly.

[24] **Q:** Okay. But that was still within your job

Page 155

[1] function?

[2] **A:** That's correct.

[3] **Q:** Okay. And as of April 1st 2003, did you [4] have direct or indirect supervisory authority over [5] the facility of managers at the various PSC [6] facilities for Fleming Wholesale Distribution [7] Division?

[8] **A:** That's correct.

[9] **Q:** Okay. Now, would that have included [10] supervisory direct or indirect responsibility for [11] Joseph Struempf at the Kansas City, Kansas [12] facilities?

[13] **A:** Yes.

[14] **Q:** When I say Kansas City, Kansas facility, [15] you understand those to be 5100, 5200 buildings [16] that we've been talking about here today and [17] 5150?

[18] **A:** Yes.

[19] **Q:** Since the filing of the bankruptcy, [20] Mr. Stegmann, have you visited these properties [21] personally?

[22] **A:** No, I have not.

[23] **Q:** So you haven't observed the state of the [24] facilities since the bankruptcy was filed?

Page 156

[1] **A:** I have not been to that facility for [2] three or four years.

[3] **Q:** Okay. Now, my understanding is, and just [4] please let me know if you were a Fleming employee [5] at the time that these leases were entered into in [6] 1993?

[7] **A:** Yes.

[8] **Q:** Okay. And did you have any involvement [9] then in the leasing process in 1993 when these [10] leases were commenced?

[11] **A:** I sat in on the negotiations.

[12] **Q:** Okay. Now, Mr. Stegmann, I'm going to [13] ask you to look at the large book that says [14] exhibit notebook which is Exhibits 1 through, I [15] believe, 48.

[16] I'll ask you to open that to Exhibit [17] Number — why don't we start with Exhibit Number [18] 1.

[19] Actually my apologies, why don't we [20] just go to number — Exhibit Number 3, which is [21] the sublease agreement by and between Shield [22] Investment Company and Fleming Companies, Inc.

[23] Are you there, sir?

[24] **A:** Yes.

Page 157

[1] **Q:** Okay. And do you recognize this [2]

document?

[3] **A:** Yes.

[4] **Q:** Okay. I'm going to ask you to turn in [5] that document to Paragraph 9.3.

[6] It's on Page 14 of the lease, if [7] that assists you, sir.

[8] **MR. BENEDICT:** If I may approach [9] the witness, Your Honor?

[10] **THE COURT:** No. He'll find it.

[11] **MR. BENEDICT:** Okay.

[12] **THE WITNESS:** I've got it.

[13] **BY MR. BENEDICT:**

[14] **Q:** All right. Now, you were present at the [15] negotiation of the lease, as I understand your [16] testimony. Does Fleming have any obligations with [17] respect to the restoration of the property [18] pursuant to Section 9.3 of the lease as long as [19] that lease is in effect?

[20] **A:** Yes.

[21] **Q:** Okay. And do those responsibilities [22] include, at the landlord's request, the [23] restoration of the physical access?

[24] Again, this is the Shield lease,

Page 158

[1] restoration of access to the Shield facility to —

[2] **MR. FOURNIER:** Your Honor, I would [3] object to the question to the extent that he's [4] seeking a legal conclusion.

[5] **MR. BENEDICT:** I'm only [6] understanding his understanding of the [7] obligation. I believe Your Honor will make the [8] ultimate determination.

[9] **THE COURT:** Why is that even [10] relevant?

[11] **MR. BENEDICT:** Well, Your Honor, he [12] was there at the conception of the lease. I want [13] to understand the expectation of the parties at [14] the time.

[15] But I'm happy to move on.

[16] **THE COURT:** Yeah.

[17] **MR. BENEDICT:** I'm happy to move [18] on.

[19] **THE COURT:** All right. Sustained.

[20] **MR. BENEDICT:** That's fine.

[21] **BY MR. BENEDICT:**

[22] **Q:** Mr. Stegmann, are you aware that at the [23] present time, there is no legal access to Kansas [24] Highway 32 with respect to this property?

Page 159

[1] **A:** Yes.

[2] **Q:** What steps, if any, has Fleming taken [3] with respect to the access issue since bankruptcy [4] filing?

[5] **A:** None.

[6] **Q:** Do you have any knowledge as to whether [7] Fleming has been asked by

the landlord to take [8] steps with respect to access?

[9] **A:** I have no direct conversations that I [10] recall with anybody requesting that we do so.

[11] **Q:** Okay. And do you know who removed the [12] access on Shield's facility?

[13] **A:** Yes.

[14] **Q:** And was that Fleming?

[15] **A:** Yes.

[16] **Q:** Okay. And do you know whether the [17] Shadrall facility, whether access has been changed [18] on the Shadrall facility as well?

[19] **A:** Yes.

[20] **Q:** And what is your understanding of the [21] changes to access on the Shadrall facility?

[22] **A:** The original facility that we leased [23] prior to adding the Metro Complex was in the [24] center of the facility. And what we did, because

Page 160

[1] we expanded Shadrall, we put 100,000 square foot, [2] approximately, expansion on the west side of [3] Shadrall property.

[4] We took an existing entrance down [5] there and modified it, and made it wider, so that [6] we could enter all truck traffic down in that [7] area. So that the trailers didn't have to back in [8] blind.

[9] **Q:** Okay, sir. There is a second exhibit [10] notebook in front of you.

[11] And I'm going to ask you to turn to [12] Exhibit Number 53. It will be in the other book, [13] sir.

[14] **A:** I've got it.

[15] **Q:** Okay. And can you recognize, or do you [16] recognize whether that's an aerial photograph of [17] the facility as it existed in 1994?

[18] **A:** Yes.

[19] **Q:** Okay. Now, looking at the large square [20] that appears to be, at least on mine in the middle [21] fold, would that be an aerial photograph of the [22] Shadrall facility?

[23] **A:** That's correct.

[24] **Q:** Okay. And moving south of that on this

Page 161

[1] photograph, do you see where the intersection with [2] Kansas Highway 32 is?

[3] **A:** Yes.

[4] **Q:** Okay. Now, I see on this photograph, and [5] would you agree with me, sir, that there are three [6] access points at the Shadrall facility?

[7] **A:** Yes.

[8] Q: Okay. And you just testified that that [9] middle access point was the primary entrance as of [10] 1994, and that Fleming redirected that traffic to [11] the far left opening?

[12] A: Yes.

[13] Q: And then you expanded that opening?

[14] A: Yes.

[15] Q: Okay. What did you do with the middle [16] opening?

[17] Did you close it?

[18] A: The middle opening was converted to just [19] associate parking for cars.

[20] Q: Okay. And moving to the — then the [21] third access point on the Shadrall facility, what [22] did you do with that?

[23] A: The third one going to the west or east?

[24] Q: I'm sorry. The third one going to the

Page 162

[1] east.

[2] A: That one was eliminated.

[3] Q: Okay. As a part of the expansion of the [4] Shadrall access points, did you also have to [5] negotiate, you being Fleming, have to negotiate [6] with the State of Kansas Department of [7] Transportation for the opening of a median cut in [8] front of the Shadrall property?

[9] A: Yes.

[10] Q: Okay. I'm going to ask you to turn to [11] Exhibit Number 51.

[12] MS. MELNIK: Excuse me, Mark, [13] Excuse me.

[14] THE WITNESS: Got it.

[15] MR. FRYE: Mark, what exhibit are [16] we on?

[17] MR. BENEDICT: We're on 51.

[18] BY MR. BENEDICT:

[19] Q: Do you recognize this document, sir?

[20] A: Yes.

[21] Q: In fact, this is a document that your [22] counsel produced to me on Wednesday of this week, [23] or pardon me, of last week —

[24] A: Yes.

Page 163

[1] Q: — during your deposition.

[2] A: Yes.

[3] Q: And this is an architectural drawing from [4] Black & Beach prepared for Fleming Companies, [5] Inc.?

[6] A: Yes.

[7] Q: And this document was prepared on or [8] about June 9th of 1994?

[9] A: Can I make a correction here. It was

not [10] prepared for Fleming Companies, Inc. It was [11] prepared for J.E. Dunn. They were —

[12] Q: Okay.

[13] A: They were the design builder of the [14] project.

[15] Q: Okay. And J.E. Dunn was your [16] construction contractor who was going to implement [17] the changes requested by Fleming?

[18] A: That's correct. That's correct.

[19] Q: Okay. And on this document, does this [20] reflect the existing median on Kansas Highway 32 [21] as of 1994 that you were proposing to open up with [22] respect to the Shadrall property?

[23] A: Yes.

[24] Q: Okay. And I just want to make sure I'm

Page 164

[1] not confused, but on this drawing, where you're [2] expanding the opening which you had identified as [3] the western-most Shadrall entrance?

[4] A: Yes.

[5] Q: Then the next entrance where the proposed [6] median cut is to be inserted, which the reference [7] I see on this is saw existing pavement cut. Is [8] that the middle access point at Shadrall, or is [9] that the eastern access point?

[10] A: That's the middle, —

[11] Q: Okay.

[12] A: — what we considered the middle.

[13] Q: Okay. And is this a true and accurate [14] depiction of the existing structure of that [15] highway and the entrance to Shadrall on or about [16] June of '94?

[17] A: Shortly afterwards.

[18] Q: Okay.

[19] A: This was a drawing that was showed the [20] design. The construction wasn't done until [21] sometime after-ward.

[22] Q: Okay. If you would continue forward in [23] your exhibit book one exhibit to Exhibit Number [24] 52. Do you recognize that as an aerial photograph

Page 165

[1] of the facility as it is today?

[2] Pardon me. As it was at the time of [3] the filing of the bankruptcy?

[4] A: Yes.

[5] Q: Okay. And again, this reflects that as [6] of today, there is no access point into the Shield [7] facility; correct?

[8] A: That's correct.

[9] Q: And no median cut in front of the Shield [10] facility?

[11] A: That's correct.

[12] Q: And that there is still two remaining [13] access points in front of the Shadrall facility?

[14] A: That's correct.

[15] Q: And there are median cuts at access to [16] eastbound and westbound K-32 from the Shadrall [17] property?

[18] A: That's correct.

[19] Q: Now, sir, if you'll move forward in your [20] exhibit book to Exhibit Number 64.

[21] A: Got it.

[22] Q: Would you take a look at that document [23] and identify whether this is the Shadrall lease [24] that we've been talking about with respect to

Page 166

[1] 5300?

[2] THE COURT: Which exhibit number?

[3] MR. BENEDICT: Exhibit Number 64.

[4] THE COURT: 64.

[5] THE WITNESS: Yes, it is.

[6] BY MR. BENEDICT:

[7] Q: Okay. And, sir, I will ask you to look [8] forward in that document to Section 8.02, which is [9] on Page 15 of that document.

[10] A: Got it.

[11] Q: Okay. I'm going to read to you the third [12] sentence.

[13] "Notwithstanding the foregoing, at [14] the time the Lease Term ends or otherwise [15] terminates for any reason, the Landlord may elect [16] to have the Tenant remove any Alterations and [17] restore the Demised Premises to its prior [18] condition as to any Alterations or demolition not [19] previously approved, or approved with a proviso [20] relating to removal by Landlord, which shall be [21] fully completed within 30 days of the end or other [22] termination of the Lease Term."

[23] Did I read that accurately?

[24] A: Yes.

Page 167

[1] Q: Okay. Have you restored Shadrall's [2] property since May 30th of 2003?

[3] A: No.

[4] Q: But pursuant to the terms of this lease, [5] should Shadrall ask you to, at least there's a [6] provision in this lease that would require you to [7] do so?

[8] MR. FRYE: Objection, Your Honor. [9] That calls for a legal conclusion. This gentleman [10] is not —

[11] THE COURT: Sustained.

[12] MR. BENEDICT: Fair enough, Your [13] Honor.

[14] MR. FRYE: — qualified to make [15] it.

[16] BY MR. BENEDICT:

[17] Q: Do you recall the circumstances under [18] which the Shield access point was removed?

[19] A: That was part of the original complex [20] changes that were — that was proposed to at that [21] time. It was Metro.

[22] Q: Did you provide a written request to the [23] landlord in 1996 to close the Shield access?

[24] A: When we did the negotiations on the lease

Page 168

[1] for those complexes, at that time, Mr. Wedlin [2] designated a Mr. Patterson, a fellow named Don [3] Patterson who was a vice president, I think for [4] the Metro Complex.

[5] And we had our contractor, and we [6] had a full-time construction superintendent, a [7] fellow named Gary Four. I set up a meeting for [8] them to go over all the drawings with Don [9] Patterson over in their offices, because they were [10] still operating out of that facility when we [11] started construction.

[12] And so that meeting took place where [13] those drawings were all gone over with them at [14] that time.

[15] Q: Okay. At the commencement of the lease, [16] the changes to the property were discussed with [17] the landlord?

[18] A: It was discussed in general at the [19] commencement of the lease, and then followed up [20] with a detailed discussion of drawing by drawing [21] over in the Metro offices with Don Patterson.

[22] Q: Do you know, sir, in 1996, when the [23] Shield curb cut and access was closed whether [24] Fleming submitted a request in writing to the

Page 169

[1] Shield landlord seeking approval of the closing of [2] the access point?

[3] A: It was not done in '96. It was done when [4] the original drawings were provided.

[5] Q: Okay. We're turning now to the Shield [6] and DEC facilities.

[7] Has Fleming paid the utilities for [8] the month of July?

[9] A: Not to my knowledge.

[10] Q: Has Fleming paid for cleaning those [11] facilities in the month of July?

[12] A: We went through and took care of the item [13] that was presented before the Court at the last [14] hearing to the best of my ability and [15] understanding. As to, you know, final cleanup or [16] what had to be done, if there was any, there was a [17] drum supposedly that was left, which everyone [18] thought was a hazardous material that was removed,

[19] but it really wasn't hazardous material as we [20] found out.

[21] So there was some odds and ends [22] stuff done to try and clean the facility up.

[23] BY MR. BENEDICT:

[24] Q: And Fleming undertook to do that only

Page 170

[1] after the landlord made a request to the Court to [2] have Fleming do that?

[3] A: Well, we had — we were under the [4] impression it was done. I mean, we were not at [5] the facility, so to speak, after we had rejected [6] the lease other than DoveBid, doing the auctioning [7] items and final cleanup.

[8] Q: Okay, sir, I just want to ask you when [9] you said — you said when Fleming rejected the [10] lease, you understand this hearing is to consider [11] whether the lease can be rejected and the timing [12] of that rejection; you understand that, don't you, [13] sir?

[14] A: Well, when I say reject the lease, I [15] don't mean in the terms of the Court rejecting the [16] lease. It's when Fleming sent the other out to [17] the landlord, it's my understanding it's not [18] official at that time.

[19] But we sent a letter out the latter [20] part of June telling the landlord that we were [21] going to vacate the facility effective June 30th [22] and turn it back over to them. That's what I mean [23] by rejection.

[24] I understand it's not official until

Page 171

[1] the judge approves it.

[2] Q: Okay. But understanding that it wasn't [3] official until the judge approves it, Fleming made [4] the decision not to pay the utilities for the [5] month of July; is that correct?

[6] A: That's correct.

[7] Q: And until the landlord asked you to, [8] Fleming had elected not to clean the facility; is [9] that correct, sir?

[10] A: We didn't — we didn't know that there [11] was still stuff left there from the DoveBid [12] auction.

[13] Q: Now, we've heard testimony that there's a [14] gentleman named Joe Strucmph and that he was a —

[15] A: Yeah.

[16] Q: — direct or indirect report to you as of [17] April 1st, 2003?

[18] A: That's correct.

[19] Q: Isn't it true that Mr. Strucmph was still [20] around that facility on or about July 1st?

[21] A: That's correct.

[22] Q: Do you have any personal know-

ledge, sir, [23] as to whether Mr. Strucmph has continued to be an [24] employee of Fleming through the month of July?

Page 172

[1] A: He is not an employee of Fleming.

[2] Q: Okay, I asked you, sir, if you have any [3] personal knowledge with respect to that.

[4] A: He's a consultant for us.

[5] Q: Okay. Was he on your payroll for all or [6] a portion of July directly as an employee?

[7] A: A portion of July.

[8] Q: Okay. Would that be through at least [9] July 11th?

[10] A: That's correct.

[11] Q: And subsequent to that time, he is a [12] consultant of Fleming?

[13] A: Just recently.

[14] Q: Okay. When did you first become aware [15] that there was a — let me rephrase that.

[16] Fleming had a roofing contractor [17] work on the roof at 5250 at the time the [18] bankruptcy was filed; is that correct?

[19] A: That's correct.

[20] Q: And who was that original contractor?

[21] A: D.C. Taylor.

[22] Q: To your knowledge, how long has D.C. [23] Taylor had a relationship with Fleming?

[24] A: Since 1986, at least since I've been

Page 173

[1] here.

[2] Q: Sure. And they've done a lot of roofs [3] for you, too, haven't they, over the years?

[4] A: That's correct.

[5] Q: In fact, they've done over a hundred [6] roofs for you?

[7] A: I've never added them up, but it's numerous.

[8] Q: Okay. If I were to represent to you that [9] Mr. Larry Stein of D.C. Taylor testified under [10] oath, and we'll read his deposition into the [11] record after we complete your testimony, sir, that [12] D.C. Taylor had done between 150 and 160 roofs [13] for Fleming over the 25 years, would that be [14] consistent with your understanding of how many [15] roofs they've done?

[16] A: I would say that that's probably close.

[17] Q: Okay. And does Fleming recognize D.C. [18] Taylor as a roofing expert having had D.C. Taylor [19] install more than 150 roofs for them?

[20] MR. FRYE: Objection, Your Honor.

[21] This calls for a legal conclusion that's

asking [23] the witness to certify an expert on roofing.

[24] **THE COURT:** Sustained.

Page 174

[1] **BY MR. BENEDICT:**

[2] **Q:** When you have a problem — when you, [3] being Fleming, have had a problem with a roof in [4] the last 16 years you've been with the company, [5] who would you have go investigate those roofing [6] conditions and report to you as to the condition [7] of the roof?

[8] **A:** Would that be D.C. Taylor?

[9] **A:** That wouldn't be the only company. There [10] was really four companies, roofing — national [11] roofing companies that we work with.

[12] **Q:** Mm-hmm.

[13] **A:** So it would depend on where it was, and [14] whether they were familiar with that roof whether [15] I would call them or not.

[16] **Q:** And would Fleming rely upon the analysis [17] of D.C. Taylor on those roofs that you sent D.C. [18] Taylor out to inspect?

[19] **MR. FRYE:** Objection, Your Honor. [20] This is all speculation.

[21] **THE COURT:** Overruled.

[22] **MR. FRYE:** There's no relevance to [23] the issues at hand.

[24] **THE COURT:** Overruled.

Page 175

[1] **THE WITNESS:** Yes, I would.

[2] **BY MR. BENEDICT:**

[3] **Q:** All right. And at some point after the [4] filing of the bankruptcy, did D.C. Taylor stop [5] working on the roof on 5150?

[6] **A:** Yes.

[7] **Q:** Do you remember, approximately, when that [8] was?

[9] **A:** I don't.

[10] **Q:** Did you have any conversation with D.C. [11] Taylor with respect to them leaving that job site?

[12] **A:** Yes.

[13] **Q:** Okay. Would that have been in April, [14] May, or June, if we can pin it down a little — [15] little bit?

[16] **A:** I think it was within the first two weeks [17] after we filed for bankruptcy.

[18] **Q:** So that would be mid-April, then, of [19] 2003?

[20] **A:** That's correct.

[21] **Q:** And who at D.C. Taylor did you [22] communicate with?

[23] **A:** Larry Stein.

[24] **Q:** And had you worked with Mr. Stein before?

Page 176

[1] **A:** Yes.

[2] **Q:** Had he been your primary contact with [3] D.C. Taylor over the years?

[4] **A:** Yes.

[5] **Q:** What did you discuss with Mr. Stein [6] during this conversation around the middle of [7] April about them leaving the job site?

[8] **A:** Well, he had called me and said that.

[9] **MR. FRYE:** Objection, Your Honor, [10] to the extent that this calls for hearsay.

[11] **MR. BENEDICT:** May it please the [12] Court, I've asked generally what they have [13] discussed, not what Mr. Stein has stated.

[14] **THE COURT:** All right. Rephrase [15] your question.

[16] **BY MR. BENEDICT:**

[17] **Q:** Generally, what did you talk about in [18] general terms, what topics did you discuss with [19] respect to the job site at 5150 Kansas Avenue?

[20] **A:** He called me to tell me that they were [21] stopping work.

[22] **Q:** Did you tell Mr. Stein — what statements [23] did you make to Mr. Stein with respect to them [24] leaving the job site?

Page 177

[1] **A:** I told them I didn't think that was the [2] right thing to do.

[3] **Q:** Did you enter into any agreements with [4] Mr. Stein regarding payment made on the 5150 to [5] any other projects you had going with D.C. Taylor?

[6] **MR. FRYE:** Objection. This is [7] irrelevant.

[8] **THE COURT:** Overruled. You can [9] answer.

[10] **THE WITNESS:** Payment, I don't [11] think, ever came up.

[12] **BY MR. BENEDICT:**

[13] **Q:** The discussion of D.C. Taylor not being [14] paid on another job never came up during that [15] conversation, Mr. Stegmann?

[16] **A:** Well, he said that he had been paid for [17] the project for, you know, for completion, so he [18] didn't — he wasn't — he couldn't afford to lose [19] \$100,000.

[20] **Q:** Okay. But you did not make any [21] statements or any agreements with Mr. Stein during [22] this telephone call that he could apply any [23] payments on the 5150 roof to this other job site, [24] which I believe is 5300, the Shadrall roof?

Page 178

[1] **A:** Never agreed to that.

[2] **Q:** Okay. I'm going to ask you to go

back to [3] the big exhibit book, and ask you to turn to [4] Document Number 26.

[5] **A:** Got it.

[6] **Q:** Okay. Have you seen this document [7] before, Mr. Stegmann?

[8] **A:** Yes.

[9] **Q:** Okay. Would you describe to the Court [10] what this document is?

[11] **A:** It's a purchase order contract for D.C. [12] Taylor to redo the roof at 5150 Kansas Avenue.

[13] **Q:** And there are some initials at the bottom [14] with a date of 9/16/02. Are those your initials, [15] Mr. Stegmann?

[16] **A:** Yes.

[17] **Q:** So you authorized the preparation of this [18] purchase order on behalf of Fleming?

[19] **A:** My boss at the time authorized it, I [20] just put my approval on this.

[21] **Q:** Higher management then you made the [22] decision to do it, but you implemented it and [23] signed this document; is that a fair statement?

[24] **A:** That's correct.

Page 179

[1] **Q:** Okay. At some point after April at some [2] point after the 1st, you learned that D.C. Taylor [3] was leaving the job site?

[4] **A:** You've testified to the discussion [5] you had with Mr. Stein.

[6] **A:** At some point after D.C. Taylor left [7] the job site, did you become aware of any leaks at [8] the termination point of the roof where D.C. [9] Taylor left the job?

[10] **A:** Yes.

[11] **Q:** When was that?

[12] **A:** After the last Court hearing.

[13] **Q:** Had you not heard about any leaks on the [14] roof prior to July 17th of 2003?

[15] **A:** None to my knowledge.

[16] **Q:** Okay. So you never — did you ever [17] instruct D.C. Taylor to go and inspect the roof on [18] behalf of Fleming prior to July 17th of '03?

[19] **A:** No, I had — did not.

[20] **Q:** Did you have any discussion or any [21] directions to D.C. Taylor after July 17th of '03 [22] to go look at the roof?

[23] **A:** That I recall, no.

[24] **Q:** All right. Are you a roofing expert.

Page 180

[1] **Q:** sir?

[2] **Q:** Do you consider yourself a roofing [3] expert?

[4] **A:** I would say that I'm not an expert. I've [5] been involved with roofs for 41 years, but I'm not [6] an expert.

[7] **Q:** Fair enough.

[8] **MR. BENEDICT:** If I may consult [9] with counsel, I may be done with this witness.

[10] **THE COURT:** All right.

[11] **MR. BENEDICT:** I'll pass the [12] witness, Your Honor. Thank you.

[13] Thank you, Mr. Stegmann.

[14] **THE WITNESS:** Thank you.

[15] **MR. FRYE:** Your Honor, I would ask [16] that in order to save time, that rather than [17] having Mr. Stegmann stand down and then us simply [18] recall him, that I not only ask —

[19] **THE COURT:** That's fine.

[20] **MR. FRYE:** — my questions are [21] geared to cross, but also what I intend to ask the [22] witness on direct.

[23] **THE COURT:** That's fine.

[24] **MR. FRYE:** And to that end, I'd ask

Page 181

[1] that the Court allow me to approach. I do have [2] Debtors' exhibit book, and I don't think the Court [3] has a copy or the witness.

[4] **BY MR. FRYE:**

[5] **Q:** Good afternoon, Mr. Stegmann.

[6] **A:** Good afternoon.

[7] **Q:** Now, I believe you testified that you [8] have been at Fleming since 1986?

[9] **A:** That's correct.

[10] **Q:** And what's your educational background [11] prior to your work employment anywhere?

[12] **A:** My educational background is I've [13] completed high school and have a bachelor degree [14] in civil engineering, and have taken several [15] educational courses since then.

[16] **Q:** And when did you complete your degree in [17] civil engineering?

[18] **A:** In 1974.

[19] **Q:** And where did you complete your degree, [20] sir?

[21] **A:** At Union College in Schenectady, New [22] York.

[23] **Q:** And since that time, have you worked as [24] an engineer?

Page 182

[1] **A:** Yes.

[2] **Q:** And briefly describe for the Court your [3] work experience.

[4] **A:** I had, as I said, a bachelor's degree in [5] civil engineering, but I majored in structures. [6] And I spent 15 years with a company called James [7] McKee & Son in construction up in the Northeast.

[8] And then I spent ten years with a [9] company called Capital Steel Corporation in [10] Oklahoma City. And then became employed with [11] Fleming.

[12] **Q:** And I think you said that was in 1986. [13] What was your original title at Fleming?

[14] **A:** Director of facilities.

[15] **Q:** And is that a position you occupy today?

[16] **A:** That's correct.

[17] **Q:** Were your duties from 1986 to the present [18] generally the same?

[19] **A:** Yes.

[20] **Q:** Okay. Now, if you would turn in your — [21] the Debtors' Exhibit Book that I just handed you [22] to Exhibit Number 1, please.

[23] Do you have that in front of you, [24] sir?

Page 183

[1] **A:** I've got it.

[2] **Q:** Can you tell us what this is, sir?

[3] **A:** This is a schematic drawing of the [4] proposed expansion that originally was laid out [5] for the properties.

[6] **Q:** If you look in the upper right-hand [7] corner, it says Exhibit B. Was this drawing [8] originally attached to the leases and sublease [9] that have been at issue this morning and this [10] afternoon?

[11] **A:** I believe it was, yes.

[12] **Q:** Now, Mr. Benedict went through the [13] various uses of the facilities at the Kansas [14] Avenue location with Mr. Malinee this morning, and [15] I won't ask you to repeat those. But I do have [16] some specific questions.

[17] You see in the middle of the drawing [18] between the Shadrall facility and the addition of [19] the Shield facility where it says ramps?

[20] **A:** Yes.

[21] **Q:** Okay. Now, at the ending point where the [22] lines all, squiggly lines go from ramps into what [23] looks like an enclosed structure on this drawing, [24] what are those ending points now called?

Page 184

[1] Would those be the links, the master [2] links between Shadrall and the Shield facility?

[3] **A:** That's correct.

[4] **Q:** Now, what's this addition to the Shield [5] facility where it says 5250?

[6] **A:** That's an expansion that Fleming was [7] proposing to add onto that facility.

[8] **Q:** So they were proposing to the landlord as [9] of 1993 to add 5250 to the existing Shield [10] facility at 5200 Kansas Avenue; is that correct?

[11] **A:** That's correct.

[12] **Q:** And was that ultimately done?

[13] **A:** Yes.

[14] **Q:** Now, if you go to the left of the drawing [15] where it says proposed addition to Shadrall [16] facility, can you tell us what that was?

[17] **A:** That was a proposed expansion that we [18] were going to add on at the end of Shadrall [19] property.

[20] **Q:** To increase your square footage for [21] storage?

[22] **A:** That's correct.

[23] **Q:** Now, I'll direct your attention back to [24] the 5150 facility to the right to the northwest of

Page 185

[1] that facility. It appears that there is a [2] railroad line that comes down between the two [3] Shield facilities and the two DEC facilities 5100 [4] and 5150.

[5] Is that still a completed rail line, [6] sir?

[7] **A:** No.

[8] **Q:** What happened to that rail line?

[9] **A:** We — it was agreed that we were going to [10] put connecting corridors to tie the two buildings [11] together because this was important to us.

[12] **Q:** The two buildings meaning the [13] buildings —

[14] **A:** 5100 and 5200.

[15] **Q:** Okay. And was 5250 also attached then to [16] 5200?

[17] **A:** Well, the corridor was built kind of in [18] between the two of them. So you —

[19] **Q:** Between 5150 and 5200 or 5100?

[20] **A:** Well, it would kind of straddle the [21] middle line there, so that you could access from [22] either one.

[23] **Q:** You could access the Shield facility from [24] either the 5150 or 5100 location?

Page 186

[1] **A:** I believe so, yes.

[2] **Q:** Direct your attention to Exhibit Number [3] 2, I believe this is the same exhibit that DEC [4] and Shield used as their Exhibit 1, which is a [5] sublease agreement between DEC Investments and [6] Fleming companies for the 5100 Kansas Avenue [7] address; is that correct, sir?

[8] **A:** That's correct.

[9] **Q:** Okay. And rather than asking you legal [10] conclusions about what these various provisions of [11] the leases say, I'm going to direct your attention [12] to Paragraph 27. Actually it's 27.2.

[13] It's on Page 22. Do you see that, [14] sir?

[15] **A:** Yes.

[16] **Q:** And where it says Notices to Landlord, [17] DEC Investments Inc., at P.O. Box 2346, 77 South [18] James, Kansas

City, Kansas to whom is Fleming to [19] address notices to the landlord?

[20] A: Mr. Hannon Wedlin.

[21] Q: Do you know who he was sir?

[22] A: Yes.

[23] Q: And who was he?

[24] A: Well, at the time that I met him, along

Page 187

[1] with one of the executive vice presidents of [2] Fleming, it was my understanding he was the [3] president of Metro.

[4] Q: And who is Metro?

[5] A: They were a warehouse operation that [6] operated 5150, 5100, and 5200.

[7] Q: Were they the predecessor to DEC and [8] Shield?

[9] MR. BENEDICT: I'm going to [10] object. It calls for a legal conclusion.

[11] I think we need to establish first [12] that Mr. Stegmann has personal knowledge. I'd [13] object to foundation if he has no personal [14] knowledge.

[15] THE COURT: Overruled. I'll allow [16] it.

[17] BY MR. FRYE:

[18] Q: Is it your understanding that Metro was a [19] predecessor to DEC and Shield for these facilities [20] at Kansas Avenue?

[21] A: That's correct.

[22] Q: I'll direct your attention to Page 27 of [23] the Exhibit 1, the sublease agreement for 5150 [24] Kansas Avenue. Are you with me, sir?

Page 188

[1] A: Yes.

[2] Q: And who appears to have signed this lease [3] on behalf of DEC Investments, Inc.?

[4] A: Donald R. Patterson.

[5] Q: And who is Mr. Patterson based on your [6] experience in these matters?

[7] A: He was the vice president of the Metro [8] Complex.

[9] Q: And he is signed here as vice president [10] of DEC Investments since that's what it appears?

[11] A: That's correct.

[12] Q: I'll direct your attention to Exhibit [13] 3, which is the lease agreement at 5150 Kansas [14] Avenue between DEC Investments and Fleming [15] Companies, Inc.

[16] It's also DEC Investments Exhibit [17] Number 2. And I will direct your attention to [18] Page 20, Paragraph 26.2.

[19] Are you with me?

[20] A: This is Exhibit 3?

[21] Q: Yes, sir. Page 20.

[22] A: Yes, Right.

[23] Q: Okay. Now, where it says 26.2, Notices [24] to Landlord to DEC Investments, P.O. Box 2346, 77

Page 189

[1] South James, Kansas City. Attention: [2] Mr. Hannon D. Wedlin.

[3] And that's the same person to your [4] understanding as was on 5100's sublease; correct?

[5] A: That's correct.

[6] Q: And then turning with me to Page 25, and [7] tell me who has signed or who appears to have [8] signed this lease on behalf DEC Investments, Inc.

[9] A: It's Donald R. Patterson.

[10] Q: Turn to Exhibit 4, if you would, sir. [11] That's the sublease agreement for 5200 Kansas [12] Avenue between Shield Investment Company and [13] Fleming.

[14] A: I've got it.

[15] Q: And if you would, turn to Paragraph 27.2 [16] on Page 22 of that sublease, sir.

[17] A: I've got it.

[18] Q: Okay. And then does it read that notices [19] to landlord go to Shield Investment Company, P.O. [20] Box 2346, 77 South James, Kansas city, Kansas.

[21] Attention: Mr. Hannon D. Wedlin?

[22] A: That's correct.

[23] Q: And is it your understanding based on [24] your experience at the negotiations of these

Page 190

[1] leases that Mr. Wedlin on behalf of Shield was the [2] same Mr. Hannon D. Wedlin that was to be given [3] notice on behalf of DEC?

[4] A: That's correct.

[5] Q: And if you would, turn to Page 27 of this [6] exhibit. And who has signed the sublease on [7] behalf of Shield Investment Company?

[8] A: Donald R. Patterson.

[9] Q: And is this the same Donald R. Patterson [10] that would have signed on behalf of DEC on the [11] leases in 5100 and 5150?

[12] A: That's correct.

[13] Q: Now, I believe you testified — strike [14] that.

[15] Before we get to the curb cut issue, [16] is it — why has Fleming, in your experience as [17] facilities manager, elected to reject the leases, [18] the DEC and Shield leases?

[19] A: We could no longer afford as a company to [20] keep the facility up and running. It was losing a [21] lot of money.

[22] Q: Have the goods that were housed at those [23] facilities been moved to other Fleming facilities?

[24] A: Yes.

Page 191

[1] Q: As it stands now, these facilities at [2] Kansas Avenue, does Fleming have any use for them [3] at all, business wise?

[4] A: No.

[5] Q: And with regard to the Shadrall lease at [6] 5300 Kansas Avenue, does Fleming have any business [7] use for that lease?

[8] A: None.

[9] Q: And is it your understanding that Fleming [10] has, in fact, rejected that lease with the Court's [11] approval?

[12] A: That's correct.

[13] Q: Okay. Direct your attention, then, to [14] the curb cut issue.

[15] At the time the lease was negotiated [16] in 1993, based on your experience in those [17] negotiations, were representatives of the [18] landlord, that would be Mr. Wedlin and then [19] Mr. Patterson, were they aware that Fleming [20] planned to close its curb cut at 5200 Kansas [21] Avenue.

[22] MR. BENEDICT: I'm going to object [23] because it calls for speculation as to the minor [24] knowledge of the third party. But he can

Page 192

[1] certainly answer as to whether he told Mr. Wedlin [2] or Mr. Patterson.

[3] THE COURT: Overruled. If you [4] know.

[5] THE WITNESS: The entire project [6] was gone over with Mr. Wedlin and Mr. Patterson at [7] the time. And Mr. Wedlin had assigned Don [8] Patterson to vice president, at that time, it was [9] called Metro Warehousing, to go over the lines and [10] approval.

[11] Once the design drawings were [12] complete, they knew that the drawings that were in [13] this lease from schematic drawings, that they [14] weren't design drawings.

[15] And that's the way it was left. And [16] then —

[17] BY MR. FRYE:

[18] Q: Did you discuss in their presence the [19] removal of the curb cut at 5200 Kansas Avenue?

[20] A: I don't recall exactly if that exactly [21] was discussed or not, but I believe it was.

[22] Q: Okay. Were drawings submitted to [23] Mr. Patterson as you've testified was your [24] instructions to approve those drawings prior to

Page 193

- [1] the curb cut being removed?
- [2] **A:** That's correct.
- [3] **Q:** Based on your experience as facilities [4] manager at Fleming, did Mr. Patterson ever raise [5] an objection to the removal of the curb cut that [6] accessed the 5200 facility?
- [7] **A:** Not to my knowledge.
- [8] **Q:** At the time the leases were entered, did [9] you also discuss in the presence of Mr. Patterson [10] and Mr. Wedlin the erection of corridors that [11] would connect the Shadrall facility with the [12] Shield facility at 5200 Kansas Avenue?
- [13] **A:** Yes.
- [14] **Q:** And in fact, those corridors, for want of [15] a better term, are mentioned in the surrender [16] provision in the lease at Section 9.3, are they [17] not?
- [18] **A:** Yes.
- [19] **Q:** Were the drawings to that announced [20] Fleming's intention to erect those corridors, the [21] master links, I think as Mr. Malinee called them, [22] were they submitted to Mr. Patterson in advance?
- [23] **A:** Yes.
- [24] **MR. BENEDICT:** Your Honor, if it

Page 194

- [1] please the Court, I would ask that if there are [2] such correspondence or documents, that under the [3] best evidence rule, that the Debtor should at [4] least present those to demonstrate that those [5] documents were provided to the landlord.
- [6] **THE COURT:** Well, I'll overrule [7] that. He can answer. You can cross examine [8] him.
- [9] **BY MR. FRYE:**
- [10] **Q:** Just to clear this point up, is it your [11] understanding that documents that old have been [12] destroyed pursuant to Fleming's long-standing [13] document destruction policy?
- [14] **A:** That's correct.
- [15] **Q:** So if, in fact, you still had those [16] documents, you certainly would have produced them [17] to counsel for DEC and Shield; is that correct?
- [18] **A:** That's correct.
- [19] **Q:** Okay. Did Mr. Patterson and Mr. Wedlin [20] or anyone on behalf of DEC and Shield ever express [21] disapproval for rejecting the drawings for the [22] connections that would connect the Shadrall [23] facility and the Shield facility?
- [24] **A:** Not to my — not to my knowledge.

Page 195

- [1] **Q:** Was it anticipated or were Mr. Wedlin and [2] Mr. Patterson made aware that Fleming intended to [3] connect the DEC facilities and the Shield [4] facilities?
- [5] **A:** Yes, they did.
- [6] **Q:** Were drawings submitted to Mr. Patterson [7] announcing Fleming's intention to do that?
- [8] **A:** Yes.
- [9] **Q:** And based on your experience as [10] facilities manager, did Mr. Patterson, Mr. Wedlin, [11] or anyone on behalf of DEC or Shield ever object [12] to those plans?
- [13] **A:** Not to my knowledge.
- [14] **Q:** Were you involved in obtaining the [15] approval of Kansas' Department of Transportation [16] for moving the curb cut that was at 5200 Kansas [17] Avenue to the location that now accesses the [18] Shadrall property?
- [19] **A:** Yes.
- [20] **Q:** And can you tell me when those occurred?
- [21] **A:** I don't remember exactly when the [22] meetings with the Department of Transportation [23] occurred. But before there was a lot of things [24] that had to happen in order for this complex to

Page 196

- [1] make it happen.
- [2] And there was several things that [3] were critical to Fleming.
- [4] One, to go back a little bit, is the [5] Metro Complex would have been no good to us [6] without the connecting corridors to the Shadrall [7] property. The facility, it just wouldn't have [8] been possible for us to use that.
- [9] The expansion that we put on 5250, [10] as well as the connecting corridors, Fleming [11] wouldn't have leased the facilities if we couldn't [12] have done that. I mean, it just doesn't — [13] wasn't — the facility wouldn't have been adequate [14] to do what we needed to do.
- [15] And in conjunction with that, we met [16] with the economic development people.
- [17] **Q:** Those with the State of Kansas?
- [18] **A:** Right.
- [19] **Q:** Okay.
- [20] **A:** And we were getting a lot of jobs at that [21] time.
- [22] **Q:** Fleming was adding jobs in Kansas?
- [23] **A:** Right. And so —
- [24] **Q:** This was what time?

Page 197

- [1] **A:** This went back in '93. Prior to us [2] signing leases with the — with the DEC

- and [3] Shield, as I refer to as Metro, because that's [4] what it was at that time.
- [5] So we met with the economic [6] development. One of the things that was critical [7] to us was to give some modifications of pull off [8] lanes, because of all the traffic that would be [9] coming out of there.
- [10] Now, it was one big complex.
- [11] **Q:** All the truck traffic?
- [12] **A:** All the truck traffic.
- [13] **Q:** Because of the increased truck traffic, [14] did you need a turn off lane, an additional turn [15] off lane added to Kansas Avenue?
- [16] **A:** Yes.
- [17] **Q:** And did you work with both Kansas [18] Department of Transportation and the Kansas [19] Economic Development Department to get that done [20] and funded?
- [21] **A:** Yes, Yes.
- [22] **Q:** And what contractor did you use to get [23] that done?
- [24] **A:** For the — well, the state actually

Page 198

- [1] contracted to do the work. The agreement was that [2] the modifications that were done — when I say the [3] state agreed to do the work, the curb cuts and [4] elimination of the curb cuts was J.E. Dunn.
- [5] The State didn't really do that [6] work. That was done under J.E. Dunn.
- [7] **Q:** And that was your contractor?
- [8] **A:** That was our contractor. The median was [9] done by the State, even though J.E. Dunn's [10] designers did the drawings. And the agreement was [11] that the State would do the work and contract for [12] it, and then Fleming would share the cost 50-50 [13] with the State.
- [14] **Q:** For the median?
- [15] **A:** For the median and the pull off lane.
- [16] **Q:** And who paid for the removal of the curb [17] cut?
- [18] **A:** Fleming paid for that.
- [19] **Q:** And who paid for the expansion of the [20] curb cut in the Shadrall facility that you talked [21] about pursuant to Mr. Benedict's question?
- [22] **A:** Fleming paid for that.
- [23] **Q:** When were the — when was the curb cut [24] completed, sir, to the best of your recollection?

Page 199

- [1] **A:** Well, the State — you know, the State [2] had to get their funds in order to do it. So the [3] project I think was completed several months [4] before, did you say curb cuts or median cuts?



[5] Q: Curb cuts?

[6] A: Oh, the curb cuts, they were done — the [7] Shadrall curb cut was done in '94.

[8] Q: And what about the curb cut at Shield?

[9] A: At Shield, that was eliminated. We had [10] to, as part of the agreement, because Metro has [11] had a going operation that's 5200, 5150. They had [12] to build a new facility.

[13] Q: They could move out and Fleming could [14] move in?

[15] A: Yes.

[16] Q: When did that happen?

[17] A: That happened in '94.

[18] Q: And when was the curb cut removed in the [19] 5200 facility?

[20] A: It would have had to have been, I would [21] say, the latter part of '94, early part of '95.

[22] Q: It was accomplished well before April, [23] 1st 2003, I presume?

[24] A: That's correct.

Page 200

[1] Q: Has any work been done with regard to any [2] of the curb cuts since the filing of the [3] bankruptcy petition?

[4] A: Not to my knowledge.

[5] Q: Now, how long did it take you to get all [6] the necessary approvals from the department — the [7] Kansas Department of Transportation and the [8] Economic Development Department to get the curb [9] cuts and median issues resolved?

[10] A: I would say probably two or three [11] months.

[12] Q: So this is — it takes — it takes longer [13] than just one phone call based on your experience?

[14] A: Yes. That's correct.

[15] Q: Let's discuss the corridors that [16] connected the Shadrall facility and the 5200 or [17] the Shield facility. When were those erected, to [18] the best of your recollection?

[19] A: Well, we — even though Metro was in [20] operation since that back part of 5200 or the [21] northerly part of 5200 was an open field at the [22] time.

[23] Q: And looking at Exhibit 1, would that be [24] what's identified there as 5250 Kansas Avenue

Page 201

[1] where it says in addition to Shield facility?

[2] A: Yeah, 5250.

[3] Q: So that was an open field in '93 or '94?

[4] A: Right. And so Don Patterson allowed us [5] to go ahead and start con-

struction in there, and we [6] could do the back corridor.

[7] Q: Which one was the back corridor?

[8] A: Even though it was still in operation.

[9] THE COURT: Please don't talk over [10] him. We have a problem with the court reporter [11] taking both of you.

[12] BY MR. FRYE:

[13] Q: I'm sorry. My apologies. Which is the [14] back corridor, sir, on this map?

[15] A: That would be the north, the north ramp [16] as is designated on this drawing. We call it the [17] inner link.

[18] Q: So that was constructed when?

[19] A: That would be constructed the earlier [20] part of — this was all in construction in '94, [21] early part of '94.

[22] Q: What about the south corridor?

[23] A: Well, the south one we had to do that [24] last, and because Metro was still in operation and

Page 202

[1] Don Patterson didn't want to remove the fence, [2] so...

[3] Q: Where is the fence, sir?

[4] A: Well, the fence went right pretty [5] close — you know, it's about, I don't know, oh, [6] maybe a corridor over where the property line [7] would be to the east from the Shadrall building.

[8] Q: It ran between what's identified as the [9] Shadrall facility?

[10] A: Yeah. It ran right down where — see [11] where the ramp is, look where the A is, property [12] line is right about where the A is. If you go [13] north and south.

[14] Q: Okay. And there was a fence there?

[15] A: That was a fence there.

[16] Q: Okay.

[17] A: Well, the fence actually came up and then [18] tied back to the end of the Shield building there [19] at the corner.

[20] Q: And so that fence had to be taken down [21] before this south corridor could be erected?

[22] A: That's correct. And then Metro had to [23] get out of their operations, which they eventually [24] did, and allowed us to go ahead and start. They

Page 203

[1] moved their fence.

[2] We were able to move the fence down [3] temporarily, and put a temporary fence down. And [4] Don allowed us to get in and start doing the south [5] one.

[6] Q: And when, approximately, was that [7] completed to the best of your recollection?

[8] A: I'd say late '94, early '95.

[9] Q: Was any work done on these two access [10] corridors, the master links on or after [11] April 1st, 2003?

[12] A: No.

[13] Q: What about the connects between the DEC [14] facilities and the Shield facility? You testified [15] those were installed.

[16] Approximately, when was that done to [17] the best of your recollection?

[18] A: That was done probably, I would say, [19] early part of '95. We had to wait until Metro got [20] out completely.

[21] Q: And was that project completed prior to [22] April 1st, 2003?

[23] A: Yes.

[24] Q: And has any work been done with regard to

Page 204

[1] that connection since April 1st, 2003?

[2] A: Well, the south connection between the [3] buildings when we did the 1998 project had to be [4] redone because —

[5] Q: Was work done on — I'm sorry.

[6] A: Because of the '98 project, we turned [7] 5200 into a freezer. So we had to redo the south [8] corridor, because you're going from in the [9] project. Also, part of 5200 became the meat [10] room.

[11] So it was going from 28 degrees down [12] to minus five. And so we had to insulate that [13] corridor, so we wouldn't get defamination due to the [14] temperature.

[15] Q: Was that work completed prior to [16] April 1st, 2003?

[17] A: Yes.

[18] Q: And was any work done on these corridors [19] after the bankruptcy filing, to your knowledge?

[20] A: Not to my knowledge.

[21] Q: Now, we've heard a lot of testimony here [22] about the roof at 5150 Kansas Avenue. And you [23] testified on direct to Mr. Benedict that that work [24] was being performed on that roof at the time the

Page 205

[1] bankruptcy filing in February — on April 1st, [2] 2003; is that correct?

[3] A: That's correct.

[4] Q: Why was Fleming replacing that roof, sir?

[5] A: It was a big ice storm that hit that [6] area. It was the latter part of 2002.

[7] And it took quite a while to get [8] negotiations with an insurance company to get [9] resolved what they would agree to replace, and [10] what they wouldn't agree to replace.

[11] And it took us quite a long time to [12] get proposals. You know, when you're dealing with [13] insurance companies, you can't just give them one [14] proposal. They want to look at different [15] options.

[16] So we had to provide them with all [17] the different options until finally they resolved [18] this to what they would approve the monies for [19] replacement.

[20] Q: Direct your attention to Exhibit 5 in the [21] Debtors' Exhibit Book. I believe it's the same as [22] DEC Exhibit 6.

[23] Do you recognize that, sir?

[24] A: Yes.

Page 206

[1] Q: Can you tell us what that is?

[2] A: That's the purchase order that was issued [3] to D.C. Taylor for doing the roof on 5150.

[4] Q: The one that the insurance company did, [5] they agreed to pay for that?

[6] A: Yes.

[7] Q: And you have testified these are your [8] initials at the bottom dated 9/16/02?

[9] A: Right.

[10] Q: And you said there was an ice storm the [11] later part of 2002?

[12] A: Yes.

[13] Q: Was, in fact, the ice storm in February [14] 2002, sir?

[15] A: I'm sorry. February, yeah.

[16] Q: I just want to be clear.

[17] A: Right.

[18] Q: While you get a purchase order of — [19] what's that?

[20] A: I said I forgot we are in the latter part [21] of 2003 already.

[22] Q: All right. Okay.

[23] And when did work, to the best of [24] your knowledge, begin on 5150 pursuant to this

Page 207

[1] purchase order?

[2] A: I don't know exactly when it started on [3] 5150. They actually started replacing the roof at [4] 5300. And then when they got that done, they [5] moved over to 5250.

[6] Q: Now, turning to, if you would, to Exhibit [7] 6. Do you recognize this, sir?

[8] A: I don't have an Exhibit 6, I don't [9] think. I've got an Exhibit 3A.

[10] Q: Well, no, it's — Exhibit 6 in the tab [11] does say Deposition Exhibit 3A on it at the [12] bottom, but it's behind Tab 6.

[13] A: Okay.

[14] Q: I'm sorry. It appears to be an unsigned [15] agreement between Flem-

ing and D.C. Taylor.

[16] Was an agreement between the two [17] companies similar to this ever signed, to the best [18] of your recollection?

[19] A: No.

[20] Q: So D.C. Taylor just did the work pursuant [21] to the purchase order, is that to the best of your [22] recollection?

[23] A: Well, if you read the purchase order [24] here, I believe you go back to — it should — it

Page 208

[1] states that a copy of the proposal is attached.

[2] Q: Okay. And that would have been what you [3] understood to be the contract, sir?

[4] A: That's correct.

[5] Q: Okay. Fair enough.

[6] Now, you testified on direct that [7] you learned that D.C. Taylor had stopped work on [8] the facility, that is, the installation of the [9] roof at 5150 after — shortly after the bankruptcy [10] petition was filed on April 1st, 2003; [11] is that correct?

[12] A: That's correct.

[13] Q: And what did you understand D.C. Taylor [14] had done at the point where they stopped working?

[15] A: They, as my understanding, did a [16] temporary tie off.

[17] Q: At the 5150 facility at that point where [18] they stopped work?

[19] A: Yes.

[20] Q: And what was your understanding as to how [21] they had tied this off as a temporary tie off?

[22] A: They used caulking to tie the membrane [23] down to the existing roof.

[24] Q: The parties have stipulated that the roof

Page 209

[1] leaked on or about June 26th, 2003. How did you [2] learn about this leak?

[3] A: I heard about it through the last [4] hearing.

[5] Q: That's right. I believe you testified to [6] that on direct.

[7] A: Yeah.

[8] Q: And I believe you also testified that [9] after you learned about the roof leaking at the [10] last hearing, you instructed Mr. Stein to repair [11] the leak; is that correct?

[12] A: That's correct. I called him right away.

[13] Q: And is — I'm sorry?

[14] A: I called him right away.

[15] Q: And based on your conversation with him [16] and what happened there

after, has the leak been [17] repaired at the tie off point, to the best of your [18] knowledge?

[19] A: To my knowledge, it has not.

[20] Q: Do you know why?

[21] MR. BENEDICT: I'm going to object [22] to the extent it calls for hearsay.

[23] THE COURT: Sustained.

[24] BY MR. FRYE:

Page 210

[1] Q: I direct your attention to Exhibit Number [2] 7 behind Tab 7 in the exhibit book.

[3] A: I've got it.

[4] Q: Do you — did Fleming receive this letter [5] from D.C. Taylor that's dated June — July 31st, [6] 2003?

[7] A: Yes.

[8] Q: And tell us who Danny Apadocka is?

[9] A: Dan is — he is a facilities engineer who [10] reports to me.

[11] Q: Does he work directly under you?

[12] A: Yes.

[13] Q: And is he the one who was overseeing [14] primarily the issues with regard to the roof of [15] 5150 Kansas Avenue?

[16] A: Yes.

[17] Q: And who does this letter purport to be [18] signed by?

[19] A: Larry Stein.

[20] Q: And do I believe you testified it was your [21] primary contact at D.C. Taylor correct?

[22] A: That's correct.

[23] Q: And does Fleming make it part of their [24] ordinary practice to include in their files a

Page 211

[1] correspondence they get from companies with which [2] they do business such as D.C. Taylor?

[3] A: Yes.

[4] Q: And did this letter, in fact, come from [5] the files of Fleming?

[6] A: Yes.

[7] Q: And does Fleming keep such records in its [8] ordinary course of its business?

[9] A: Yes.

[10] Q: And if you'd read the letter, does it [11] accurately reflect, on a general basis, the time [12] line of events, so to speak, between the leak on [13] June 23rd and the day of the letter based on your [14] recollection?

[15] A: Not to my knowledge, it wasn't.

[16] Q: You disagree with some of the

things that [17] are said in this letter?

[18] **A:** No. I don't disagree with it.

[19] To my knowledge, there wasn't any [20] discussion, I think your question was prior to [21] this, regarding this letter.

[22] **Q:** Right. But when you received the letter, [23] did you review it?

[24] **A:** Yes.

Page 212

[1] **Q:** And are the events as outlined in the [2] letter similar to your recollection of how they [3] transpired after the leak on June 26th?

[4] **A:** Yes.

[5] **Q:** Turn, if you would, to Exhibit 8.

[6] And the first page is a declaration [7] of Dan Apadocka, whom you identified as an [8] employee that works directly under you; is that [9] correct?

[10] **A:** Yes.

[11] **Q:** Did you dispatch Mr. Apadocka, along with [12] another Fleming employee, to the Kansas Avenue [13] facilities on or about July 28th, 2003?

[14] **A:** Yes.

[15] **Q:** And what was the purpose of that visit?

[16] **A:** To go up and walk through the facility [17] with Mr. John Malinee to make sure that there [18] wasn't anything that wasn't cleaned up, or that [19] there wasn't hazardous material left as has been [20] previously stated.

[21] **Q:** And was Mr. Apadocka to take pictures or [22] the Fleming employees to take pictures of the [23] facilities?

[24] **A:** Yes.

Page 213

[1] **Q:** And according to Mr. Apadocka's [2] declaration, the pictures that are attached to the [3] affidavit, —

[4] **MR. BENEDICT:** We'll stipulate to [5] the admission of the photographs, Your Honor.

[6] **MR. FRYE:** All right. If you take [7] a — thank you, Mr. Benedict.

[8] **BY MR. FRYE:**

[9] **Q:** If you take just a brief look at some of [10] the photos, do these appear, the facilities appear [11] to be broom clean to you?

[12] **A:** They're more than broom cleaned.

[13] **MR. FRYE:** And just for Court's [14] reference, the locations of each picture and the [15] directions that the camera was pointing are [16] identified on the side map behind Exhibit 8B.

[17] **BY MR. FRYE:**

[18] **Q:** Finally, Mr. Stegmann, if you'd turn to [19] Exhibit Number 9, behind Tab 9.

Can you tell us [20] what that is, sir?

[21] **A:** Exhibit 9 is a diagram of the 5200, 5250, [22] 5100, and 5150, racking lay out.

[23] **Q:** No. No. No. I think you're at picture [24] Number 9.

Page 214

[1] **A:** Yeah.

[2] **Q:** No. And actually I think you may be in [3] the wrong book.

[4] **A:** Okay.

[5] **Q:** You're in the Debtors' —

[6] **A:** Yeah.

[7] **Q:** — Exhibit Book?

[8] **A:** Yeah.

[9] **Q:** Okay. Behind Tab 9?

[10] **A:** OKAY.

[11] **Q:** Okay. Are you with me?

[12] **A:** Yeah.

[13] **Q:** Do you recognize this letter, sir?

[14] **A:** It's a letter of proposal from J.E. Dunn.

[15] **Q:** Yes, sir. Do you recognize it?

[16] **A:** Yes.

[17] **Q:** Okay. Can you tell us why — it says [18] that you received a copy of this. Can you tell us [19] what, if anything, you had asked J.E. Dunn [20] Construction Company to do?

[21] **A:** Well, because of all the information that [22] I had gathered and what was going on with Court, I [23] had asked J.E. Dunn to give me a proposal on [24] anything I could think of that would cause or

Page 215

[1] restore their property back to original, anything [2] I could think of.

[3] **Q:** Why did you ask J.E. Dunn to do that?

[4] **A:** Because I didn't know where this thing [5] was going.

[6] **Q:** Did J.E. Dunn do all the construction [7] there previously?

[8] **A:** Yes.

[9] **Q:** So they were familiar with the property?

[10] **A:** They were very familiar, had all the [11] drawings and —

[12] **Q:** Okay. Turn if you would, to the second [13] page of that exhibit, where it says construction [14] cost, site separation and drive entrance.

[15] **A:** Yes.

[16] **Q:** Cost 816, I presume, thousand dollars, [17] And actually a 116 — \$216?

[18] **A:** That's correct.

[19] **Q:** Is that for replacing the curb at the [20] 5200 facility?

[21] **A:** Yes.

[22] **Q:** And are the — is the breakdown of this [23] estimate attached on the next page as to where [24] they get that figure?

Page 216

[1] **A:** That's correct.

[2] **Q:** And is a further description of the work [3] that they would do on the fourth to the last page [4] where it says Project Description Page 1 of 3 at [5] the number one, period?

[6] **A:** I guess I don't understand where are [7] you.

[8] **Q:** I'm sorry. It would be, I said, four [9] from the back. But we'll count over from the [10] front.

[11] **A:** Okay.

[12] **Q:** It would be the eighth page.

[13] **A:** Where it says project description?

[14] **Q:** Yes.

[15] **A:** Okay. Got it.

[16] **Q:** And at the number one period, is that a [17] general description of the work that J.E. Dunn [18] would propose to do at the site separation and [19] drive entrance to restore the curb?

[20] **A:** That's correct.

[21] **Q:** And referring back to the second page of [22] the exhibit, where it says separate utilities, [23] Number 4,

[24] **A:** Yes.

Page 217

[1] **Q:** — is J.E. Dunn's estimate, that that [2] would cost \$193,393?

[3] **A:** That's correct.

[4] **Q:** And what do you understand — would that [5] be the erection of a fire wall; is that what that [6] means?

[7] **A:** Separate. What the utilities —

[8] **Q:** Yeah.

[9] **A:** No. Separate. The utilities would be [10] the electric and gas, and that sort of thing.

[11] **Q:** And that's identified?

[12] **A:** If you look at Page 203, Paragraph 4 in [13] project description.

[14] **Q:** Okay. That's where that's identified; [15] right?

[16] **A:** Right.

[17] **Q:** On this Exhibit Number 9 where J.E. Dunn [18] has estimated it's going to cost, approximately, [19] \$116,000 to restore the curb cut.

[20] Has J.E. Dunn, to your knowledge, or [21] Fleming, approached the authorities in Kansas to [22] seek approval for having any of this done?

[23] **A:** I don't know whether J.E. Dunn has or [24] not, but Fleming hadn't.

Page 218

[1] Q: And based on your experience the last [2] time, would this be — would such approval, [3] assuming that it was granted, be a process that [4] could take months or longer?

[5] A: I wouldn't think so.

[6] Q: How long would you estimate that it might [7] take?

[8] A: I wouldn't think it would take anymore [9] then it took Fleming three to four months.

[10] Q: Three or four months?

[11] A: To put the curb cut in.

[12] Q: Okay. Now, finally, did you understand [13] that the roof repair undertaken after the February [14] 2002 ice storm that was required by the repair [15] provision of the lease in 5150; is that correct?

[16] A: That's correct.

[17] MR. FRYE: Nothing further, Your [18] Honor.

[19] THE COURT: I guess, redirect or [20] cross, whatever you want to call it.

[21] MR. BENEDICT: I'm not sure what I [22] want to call it, Your Honor, but I certainly have [23] a few questions.

[24] BY MR. BENEDICT:

Page 219

[1] Q: I'm suffering from binder buildup. [2] Mr. Stegmann, were you aware that [3] counsel from DEC sent a letter to your counsel on [4] April 9th, requesting that Fleming take steps to [5] restore the access at 5200? April 9th.

[6] A: I don't recall.

[7] Q: Okay. And your testimony is that it [8] would take a matter of three to four months for [9] the access to be restored. [10] So if Fleming had begun that process [11] on April 9th when requested by the landlord, that [12] could be done now, couldn't it?

[13] A: Most likely.

[14] Q: Okay. Let's turn now to the exhibit your [15] counsel was asking you about, which is the J.E. [16] Dunn, for lack of a better word, estimate, bid.

[17] And I would like you to move forward [18] in that document three pages to what's identified [19] as site separation and drive entrance.

[20] Are you there yet, sir?

[21] A: This is in the Debtors' Book.

[22] Q: Yes. I'm sorry.

[23] This is Exhibit 9, Tab 9 in the [24] Debtors' Book.

Page 220

[1] A: I've got it.

[2] Q: The J.E. Dunn that you were just looking [3] at?

[4] A: Right.

[5] Q: And I'm on Page 3, site separation and [6] drive entrance.

[7] Let me know when you're on the right [8] page, sir.

[9] A: Yes, I've got it.

[10] Q: Okay. Now, as I understand your [11] testimony, this is a summary of what it would take [12] to open up the curb cut?

[13] A: That's correct.

[14] Q: Okay. Now, Item D, fencing, is that [15] physically necessary to open up the curb cut?

[16] A: Well, he had a slight separation and [17] drive entrance.

[18] Q: Okay. Just focusing on the opening up of [19] the curb cut, that's what I want to determine is [20] this Item D, fencing, necessary for opening the [21] curb cut?

[22] A: No.

[23] Q: Okay. Is the interior partition [24] necessary for opening up the curb cut?

Page 221

[1] A: No.

[2] Q: Okay. Excavation and grading work?

[3] A: Yes.

[4] Q: Concrete work?

[5] A: Yes.

[6] Q: Okay. So if we just take the Items B, [7] then C, the excavation, grading, and the concrete [8] work, I get \$13,350.

[9] A: That would be correct.

[10] Q: Okay. And so that's the physical cost to [11] open up the curb cut?

[12] A: Yeah.

[13] Q: Okay. Does this include the right with [14] the State to access the highway?

[15] A: I would say that it's probably a [16] permitted costs that would be on top of this.

[17] Q: But this assumes you would get that; [18] right?

[19] A: Yes.

[20] Q: Okay. But this doesn't address the issue [21] of whether Fleming, or pardon me, whether the [22] landlord, Shield, has that right today?

[23] A: That's correct.

[24] Q: Okay. The Item E, interior partitions,

Page 222

[1] is that the cost to erect the fire wall between [2] the Shield facility and Shad-rall facility?

[3] A: That's correct.

[4] Q: You had some testimony during Mr. Frye's [5] examination with respect to an insurance claim for [6] the roof at

5150?

[7] A: Yes.

[8] Q: Okay. Do you remember when you finalized [9] that insurance claim?

[10] A: The total dollar amount?

[11] Q: No, sir. I'm asking when you finalized, [12] the date and time.

[13] MR. FRYE: Objection, Your Honor. [14] I don't think this witness actually finalized [15] that.

[16] THE COURT: Overruled. If he can [17] answer.

[18] Do you know when it was finalized?

[19] THE WITNESS: I don't. I'm [20] wondering what he means by finalized.

[21] THE COURT: You want to clarify?

[22] MR. BENEDICT: If it please the [23] Court, I'd like to mark a rebuttal exhibit and use [24] it to refresh this witness recollection.

Page 223

[1] THE COURT: Do you want to clarify [2] your question first? He didn't answer.

[3] MR. BENEDICT: Sure. Let me [4] clarify that.

[5] BY MR. BENEDICT:

[6] Q: Mr. Stegmann, do you recall when you sent [7] to your insurance company the final master proof [8] of loss agreement executed by Fleming representing [9] the insurance claim for this facility?

[10] A: I didn't do that. Our risk management [11] people did.

[12] So I don't know.

[13] Q: You did not do that, and you have no [14] knowledge?

[15] A: I have knowledge it was done. But when [16] it was done, I don't know when.

[17] MR. BENEDICT: If it please the [18] Court, I'd like to mark a rebuttal exhibit, and [19] we've marked it as Number 68. If I might hand one [20] to the Court and deputy, and then I'll approach [21] the witness.

[22] MR. FRYE: Your Honor, may I see [23] that?

[24] THE COURT: You may.

Page 224

[1] MR. BENEDICT: You will.

[2] BY MR. BENEDICT:

[3] Q: Mr. Stegmann, is this not a letter dated [4] April 15th, 2003 to Crawford regarding a master [5] proof of loss?

[6] A: That's correct.

[7] Q: Whose signature is on this letter?

[8] A: Mine.

[9] Q: And is this the master proof of loss with [10] respect to the insurance claim made for the 5150 [11] building?

[12] A: That's correct.

[13] Q: And what was the amount that you made a [14] claim to your insurance company for?

[15] A: \$1,194,178.

[16] Q: And now, if I — let me see, and tell me [17] if I've read this accurately. I'm reading the [18] letter, which is the first page of Exhibit 68.

[19] "Enclosed please find the Master [20] Proof of Loss signed by our Mr. George Ward. [21] Please let me know when Fleming can receive the [22] check for the balance."

[23] A: Right.

[24] Q: Is that accurate?

Page 225

[1] A: That's correct.

[2] Q: Have you received the check now?

[3] A: Yes.

[4] Q: Okay. And have you remitted those [5] proceeds to DEC or Shield?

[6] A: I have not.

[7] Q: What has Fleming done with those [8] proceeds?

[9] A: I don't know.

[10] Q: Okay. Do you know who the insurance [11] certificate holder is on this particular parcel of [12] property?

[13] A: I don't.

[14] Q: Would you turn to Page 2 of Exhibit [15] Number 68, Question Number 3.

[16] THE COURT: What's the exhibit [17] number?

[18] MR. BENEDICT: This is Exhibit [19] Number 68, the one we just handed up to the Court.

[20] THE COURT: Oh, okay.

[21] MR. BENEDICT: Page 2. The loose [22] one we just handed you, Mr. Stegmann.

[23] THE WITNESS: Okay.

Page 226

[1] BY MR. BENEDICT:

[2] Q: Question 3.

[3] A: Okay.

[4] Q: Title and Interest: At the time of the [5] loss, the interest of your Insured in the property [6] described above — pardon me — described therein [7] was, and there's a typewritten delineation, Sole [8] Owner.

[9] Is that correct, sir?

[10] A: That's correct.

[11] Q: So I read that correctly?

[12] A: Yes.

[13] Q: And this is the proof of loss as to the [14] ice storm with respect to the 5150 building and [15] the 5300 building;

correct?

[16] A: Correct.

[17] Q: We've identified as Exhibit Number 1, 2 [18] and 3 the leases with DEC and with Shield, and [19] we've identified as Exhibit Number 64 the lease [20] with Shadrall.

[21] Isn't it correct, sir, that [22] Fleming's interest in these properties was as [23] lessee, not as owner?

[24] A: I didn't fill this out. This was done by

Page 227

[1] our Risk Department.

[2] I don't know what they consider, how [3] they consider.

[4] Q: That wasn't my question, sir. My [5] question was: Is Fleming's interest in this [6] property as a tenant, not as the owner?

[7] A: That's correct.

[8] Q: So this statement to the insurance [9] company as reflected on this Master Proof of Loss [10] executed by Mr. George Ward, which under your [11] signature was transmitted to the insurance company [12] is not accurate in Question Number 3?

[13] A: I would say, yes.

[14] Q: Okay. Was this transferred through the [15] mail?

[16] A: Yes, it was, I believe. I think it was [17] faxed and mailed.

[18] Q: Okay.

[19] MR. FRYE: Your Honor, it doesn't [20] have a signature of anyone. It certainly doesn't [21] have Mr. Stegmann's name, to my knowledge, doesn't [22] appear on this.

[23] I don't think there can be a [24] foundation laid as to admissibility as evidence.

Page 228

[1] THE COURT: Well, let's find out. [2] Is this 69?

[3] MR. BENEDICT: It will be, Your [4] Honor. Could I approach the witness?

[5] THE COURT: You may.

[6] MR. BENEDICT: My apologies to the [7] Court. We only have one copy of the exhibit. [8] After we ask the witness questions, I guess we'll [9] ask the witness to provide you with the copy.

[10] THE COURT: Okay.

[11] BY MR. HAMPTON:

[12] Q: Mr. Stegmann, I'll hand you what's been [13] marked as Exhibit Number 69, DEC and Shield [14] Exhibit Number 69.

[15] Have you ever seen that document [16] before?

[17] A: No.

[18] Q: No. Have you ever seen doc-

uments like [19] that?

[20] A: I probably have, but that's not my — I'm [21] not responsible for any of this. It's done by our [22] Risk Department.

[23] Q: Okay. You would agree with me, however, [24] that that reflects that the certificate holder on

Page 229

[1] that insurance binder is DEC Investment Company; [2] correct?

[3] A: That's correct.

[4] MR. BENEDICT: I'll lay the [5] foundation through a rebuttal witness. Your [6] Honor. I'll withdraw the witness for the moment. [7] If I may approach the witness?

[8] THE COURT: You may.

[9] BY MR. BENEDICT:

[10] Q: Mr. Stegmann, do you have personal [11] knowledge as to whether the roof leak, which has [12] been stipulated to as occurring on June 23rd, [13] whether that existed prior to April 1st?

[14] A: No, I don't.

[15] Q: Okay. You have testified, I believe — [16] strike that.

[17] Prior to April 1st, 2003, Fleming [18] leased and operated a distribution facility on [19] North Atlantic Street in Kansas, did it not?

[20] A: Yes. That's correct.

[21] Q: And what type of warehouse was that? Was [22] that a dry warehouse or a refrigerated warehouse?

[23] A: It was basically refrigerated, but it had [24] a small part of dry.

Page 230

[1] Q: Okay. And at some point around 1999, [2] Fleming made a determination as part of a [3] strategic plan that it would close that facility [4] and move the refrigerated portion of that [5] warehouse to Kansas City, Kansas facility at some [6] future time; is that correct?

[7] A: I don't remember if it was '99, but we [8] talked about it for several years.

[9] Q: Okay. At least as earlier as 2000?

[10] A: Yes, I'd say so.

[11] Q: Okay. At some point prior to April 1st [12] of 2003, did a portion of the goods that would [13] normally be stored at the Atlantic Street property [14] get moved to and begin being stored at the 51, [15] pardon me, the Kansas City warehouse facilities [16] that we've been talking about here today, the [17] 5100, the 5200?

[18] A: Yes.

[19] Q: 5150?

[20] A: Yes.

[21] Q: Okay. Would you describe for the Court [22] what you moved prior to April

1st?

[23] A: From the Atlantic Street?

[24] Q: From the Atlantic Street property.

Page 231

[1] A: We moved in 1999, we moved meat. We had [2] meat storage from there over to 5100.

[3] And then in March, we moved 2003, we [4] moved dairy deli from Atlantic Street over, too.

[5] Q: Okay, sir. Do you have in front of you [6] the movants', DEC and Shield's exhibit book, the [7] larger one that has the time as 3:00 p.m. on the [8] cover that says Exhibit Number Book?

[9] A: Yes.

[10] Q: I'm going to ask you to turn to Exhibit [11] Number 10 in that book, which is the survey of the [12] real property.

[13] A: I've got it.

[14] Q: My apologies. If you would turn with me [15] to Number 11. That's the survey of just the DEC [16] and Shield facility.

[17] It's a little bit bigger. Do you [18] have that now in front of you, sir?

[19] A: At Exhibit 11?

[20] Q: Yes.

[21] A: Yes.

[22] Q: Now, this is — and I'll represent to you [23] this is a survey of the DEC and Shield facilities [24] located at 5100, 5150 and 5200.

Page 232

[1] A: Yes.

[2] Q: I believe you've heard the testimony [3] about that here today?

[4] A: Yes.

[5] Q: The warehouse is represented on this [6] exhibit. A portion of them are dedicated to [7] refrigerated warehouse space; is that correct?

[8] A: That's correct.

[9] Q: Okay. And which of the warehouse space [10] here was compatible with the move from Atlantic [11] Street in 1999?

[12] A: There was — 1999? There was nothing [13] compatible.

[14] Q: So it was all refrigeration units at that [15] time at Kansas City, Kansas to accommodate the [16] move from Atlantic Street?

[17] A: And insulated walls.

[18] Q: And insulated roofs in the 5100 building?

[19] A: I don't remember now whether we did an [20] insulated roof. I don't know if it was necessary [21] in that area.

[22] Q: Okay. All right.

[23] Now, in March of 2003, you moved [24] additional goods from the Atlantic Street

Page 233

[1] warehouse to the Kansas City, Kansas warehouses; [2] correct?

[3] A: That's correct.

[4] Q: And I believe you said meat and deli?

[5] A: No. We just did dairy deli.

[6] Q: Dairy deli. And where was that in the [7] 5100 building, the 5150 building, the 5200 [8] building, or the 5250 building, do you recall?

[9] A: 5100.

[10] Q: 5100. Okay.

[11] Now, there's been some discussion of [12] the roof with respect to the 5150 building, and [13] again in the book that you have opened, Item [14] Number 26, which is the purchase order, Exhibit [15] Number 26 in the same book you're in.

[16] A: I've got it.

[17] Q: Okay. And you'll agree with me that this [18] is the purchase order that you initialed to D.C. [19] Taylor for the installation of the roof on 5150?

[20] A: That's correct.

[21] Q: Okay. And that's the northern part of [22] the DEC facility; correct?

[23] A: Yes.

[24] Q: Which is currently dedicated to dry

Page 234

[1] warehouse space?

[2] A: That's correct.

[3] Q: Okay.

[4] A: There's a main office there, too.

[5] Q: And the administrative offices — thank [6] you. I appreciate that clarification.

[7] Now, tell me if I've read this [8] correctly in your purchase order, furnished labor [9] and material per your proposal dated February 1, [10] 2001 to remove smoke hatches. Furnish and install [11] new insulation and mechanically fasten Stevens EP [12] white roof membrane system over the metal roof [13] over future perishable and office areas, [14] approximately, 71,500 square feet. Copy of [15] proposal attached.

[16] Did I read that accurately?

[17] A: Yes.

[18] Q: So it's expressly contemplated when you [19] signed this purchase order for D.C. Taylor to [20] install this new roof over the future perishable [21] area; correct?

[22] A: That's correct.

[23] Q: And because you had intended to use the [24] spaces as a future perishable

area, having an

Page 235

[1] insulated roof was important to Fleming, wasn't [2] it?

[3] A: It helps.

[4] Q: That would improve the ability to use [5] this portion of the warehouse as refrigerated [6] space, would it not?

[7] A: Yes.

[8] Q: And Fleming had a plan to relocate the [9] Atlantic Street merchandise to the Kansas City [10] facility after it improved the property by [11] installing this insulated proof; correct?

[12] A: That was the future claims.

[13] Q: Do you know if Metro Warehouses was the [14] property manager or the owner of these facilities [15] when you negotiated the leases in 1993?

[16] A: As I recall, Mr. Wedlin was the owner.

[17] Q: Okay. Now, it's true, that Fleming [18] signed these leases with the owner of that — [19] owners identified in each of the respective leases [20] as to 5100 and 5150 as DEC; correct?

[21] A: That's correct.

[22] Q: And as to 5200 as Shield; correct?

[23] A: Correct.

[24] Q: But at the time you negotiated those

Page 236

[1] leases, you were negotiating with an entity called [2] Metro Warehouses; is that correct?

[3] A: That's correct.

[4] Q: Do you have any personal knowledge as to [5] the relationship between those companies?

[6] A: I was told that.

[7] Q: I'm not asking what you were told. I was [8] asking if you had personal knowledge?

[9] A: I don't have personal knowledge.

[10] MR. BENEDICT: Let me confer with [11] your counsel. I may be wrapped up.

[12] (Following a discussion held off the [13] record.)

[14] MR. BENEDICT: I will pass the [15] witness, Your Honor. Thank you, Mr. Stegmann.

[16] BY MR. FRYE:

[17] Q: Mr. Stegmann, has Fleming already paid [18] for the 5150 roof in full to D.C. Taylor?

[19] A: Yes.

[20] MR. FRYE: I have nothing further, [21] Your Honor.

[22] I'm sorry.

[23] MR. BENEDICT: No redirect.

[29] MR. FRYE: I forgot to confer with

Page 237

[1] counsel. I apologize.

[3] MR. BENEDICT: I apologize.

[3] BY MR. FRYE:

[4] Q: And is it your understanding that the [5] entire amount that, or at least a portion of the [6] amount that's been paid for the 5150 roof was then [7] applied by D.C. Taylor to an outstanding invoice [8] off set, in other words, for an unpaid invoice on [9] the 5300 roof at Kansas Avenue?

[10] A: Yes. Okay.

[11] MR. FRYE: Nothing further.

[12] THE COURT: Anything?

[13] MR. BENEDICT: I have nothing [14] further with this witness, subject to recall on [15] rebuttal, if something should arise.

[16] THE COURT: Thank you. You may [17] step down.

[18] THE WITNESS: Do I leave this [19] here?

[20] THE COURT: Leave everything [21] there. Yes.

[22] Thank you.

[23] MR. BENEDICT: If it please the [24] Court, Your Honor, I have the deposition

Page 238

[1] transcript of Larry Stein. There are portions of [2] which I wish to read into the record as my third [3] witness.

[4] The witness resides in Cedar Rapids, [5] Iowa, which is outside the subpoena power of the [6] Courts. And I believe that Mr. Frye and I have at [7] least stipulated that he is unavailable for the [8] purpose of that.

[9] To make sure that Mr. Frye's client [10] is adequately protected, I will pause after [11] reading each of the questions to provide an [12] opportunity to object, and then I will read the [13] answer.

[14] THE COURT: Okay.

[15] MR. BENEDICT: And for the Court to [16] follow along, we have also included in our exhibit [17] books, that would be Exhibit Number 63.

[18] MR. BENEDICT: If the parties would [19] like, we could take a bathroom break before we [20] begin reading that. I'm willing to proceed, but [21] if anyone else needs to take a break.

[22] MR. FRYE: I prefer to keep going.

[23] THE COURT: Go ahead.

[24] MR. BENEDICT: We'll just go right

Page 239

[1] ahead.

[2] THE COURT: All right.

[3] MR. BENEDICT: If it please the [4] Court, Your Honor, I'm going to begin reading on [5] Page 5, Line 20.

[6] (Beginning of transcript read-in of [7] Larry Stein.)

[8] Q: Sir, would you please state your full [9] name for the record.

[10] A: Larry Stein.

[11] MR. BENEDICT: I'm now going to [12] refer to Page 6, beginning on Line 6 through 17.

[13] Q: Are you currently employed?

[14] A: Yes, I am.

[15] Q: Where?

[16] A: D.C. Taylor Company.

[17] Q: What's your title with D.C. Taylor [18] Company?

[19] A: I am a vice president and technical [20] director.

[21] Q: How long have you been a VP and technical [22] director at D.C. Taylor?

[23] A: About ten years.

[24] Q: How long have you been employed by D.C.

Page 240

[1] Taylor Company?

[2] A: 22 and a half years.

[3] MR. BENEDICT: I am now going to [4] turn to Page 10, beginning on Line 11 through 21.

[5] Q: Do you have any specialized training in [6] roofing?

[7] A: Miscellaneous seminars.

[8] Q: Have you ever taught roofing to anyone?

[9] A: We deliver roofing seminars to [10] perspective clients.

[11] Q: Have you ever given those seminars?

[12] A: Yes.

[13] Q: And have you trained others in the field [14] other than those seminars?

[15] A: Yeah. I've tried to help some of our new [16] people as they come on board.

[17] MR. BENEDICT: I'm now turning to [18] Page 9, beginning with Line 1 through 23.

[19] Q: As a VP and technical director, what are [20] your responsibilities?

[21] A: My primary responsibilities are [22] generating business, sales, and workmen's support [23] of other salespeople.

[24] Q: As a part of those responsibilities, do

Page 241

[1] you have any dealings with Fleming?

[2] A: Yes.

[3] Q: What type of dealings did you

have?

[4] A: I'm pretty much our company's account [5] manager. I have responsibility for the Fleming [6] account, all aspects.

[7] Q: If I heard right, you testified earlier [8] that you, I guess, you have been working for D.C. [9] Taylor for, approximately, 20 years?

[10] A: 22 years, yes.

[11] Q: During those 22 years, how many roofing [12] jobs did you have with Fleming?

[13] A: Between 150 and 160.

[14] Q: Specifically, did you work with Fleming [15] on projects covering 5150 Kansas Avenue and 5300 [16] Kansas Avenue?

[17] A: Yes, I did.

[18] MR. BENEDICT: Continuing on, on [19] Page 11, Lines 5 through 7.

[20] Q: How long have you been working with [21] Fleming in the roofing industry?

[22] A: My first project with Fleming was 1993.

[23] MR. BENEDICT: I will now turn to [24] the deposition — in the deposition to Page 18.

Page 242

[1] Line 25.

[2] Q: So is the roof over 5300 Kansas Avenue [3] different than the roof over 5150 Kansas Avenue?

[4] A: The assembly design is different.

[5] MR. BENEDICT: Pardon me. [6] Continuing on to Page 19.

[7] Q: Can you explain some of the differences?

[8] A: They both utilize the same waterproofing [9] membrane. They are both attached to the structure [10] mechanically, but they have different thickness [11] and amounts of insulation.

[12] Q: What's the thickness of insulation for [13] the 5300 Kansas Avenue?

[14] A: One layer of one and a half inch.

[15] Q: What about the thickness of insulation [16] for 5150?

[17] A: It's a quarter inch insulation, and one [18] inch. And then a second layer, inch and a half.

[19] Q: Could you explain the significance of the [20] differences in insulation?

[21] A: The 5150 would have a higher R value with [22] thermal resistance value, then would the dry [23] warehouse.

[24] The 5100 —

Page 243

[1] Q: Could you explain what the R value means?

[2] A: That's the materials assigned in R value [3] that relates to the resistance to the flow of heat [4] through itself. So the higher the R value, the [5] more thermally efficient the material would be.

[6] Q: The harder it is for heat to go through [7] it?

[8] A: Correct.

[9] MR. BENEDICT: Continuing on Page [10] 20.

[11] Q: Which roof has a higher R value?

[12] A: The 5150.

[13] MR. BENEDICT: Line 15.

[14] Q: Could both roofs be used for a [15] refrigerated warehouse?

[16] A: They both could if you wanted to pay an [17] exorbitantly high energy cost to cool them.

[18] Q: Which one is better suited for a [19] refrigerated warehouse?

[20] A: That would be 5150.

[21] MR. BENEDICT: We'll now turn to [22] Page 57 of the deposition.

[23] I'm sorry, Page 56. Lines 1 through [24] 15.

Page 244

[1] Q: The roof that was being installed on [2] 5150, I believe you testified earlier was [3] significantly better insulated, the new roof would [4] have been than the old roof, correct?

[5] A: Correct.

[6] Q: Would that insulation or could that [7] additional insulation serve a refrigerated [8] warehouse or the new roof, I'm sorry?

[9] A: At his request, we can.

[10] Q: His meaning?

[11] A: Dave Stegmann.

[12] Q: Okay.

[13] A: We installed an amount of insulation that [14] he believed would be appropriate for a [15] refrigerated space in the 36-degree temperature.

[16] MR. BENEDICT: I'll return us back [17] now to Page 20 of the deposition.

[18] Moving forward to Page 22, Lines 11 [19] through 25.

[20] Q: How did D.C. Taylor conclude or wind up [21] the work on the roof over 5150 Kansas Avenue?

[22] A: We basically finished out of the work to [23] make a straight tie off line running north and [24] south through the building. Then we used a

Page 245

[1] different additional material to create a seal as [2] best we could, given the profile of the existing [3] roof along that line.

[4] Q: You mentioned a tie off. Can you [5]

describe the tie off?

[6] A: Basically we were — we were using a [7] flexible roof membrane to construct the roof. And [8] when we then used that membrane, brought it down [9] over the insulation, created a seal with sealant, [10] membrane, and determination bar to create a [11] gasket-type seal between the membrane and the [12] existing metal panel roof.

[13] MR. BENEDICT: Continuing on Page [14] 23, Lines 13 to 25.

[15] Q: Can we describe the roof that was [16] originally there as the old roof?

[17] A: Yes.

[18] Q: And can we describe the roof that was [19] replaced between February 2003 and April 11th, [20] 2003 as the new roof?

[21] A: Yes.

[22] Q: Could you describe the differences [23] between those two roofs?

[24] A: The old roof is a sealed clip metal panel

Page 246

[1] roof. The panel functions as both the DEC, as [2] well as the water proofing.

[3] The new roof utilized those metal [4] panels as a substrate to hold additional [5] insulation and the roof membrane.

[6] MR. BENEDICT: Beginning and [7] continuing on Page 24.

[8] Q: So what are the significant differences [9] between the two roofs?

[10] A: The new roof is, obviously, more heavily [11] insulated. It's waterproof covering a 45-mil [12] flexible membrane.

[13] The old roof is a 24-gauge metal [14] panel.

[15] MR. BENEDICT: Continuing on Lines [16] 11 through 25.

[17] Q: Are the two roofs the same height?

[18] A: No.

[19] Q: Which roof is taller than the other?

[20] A: The new roof would be thicker.

[21] Q: Do you know how much thicker?

[22] A: From the bottom of the panel to the top [23] of the new roof would be about four, four and [24] three quarters from the bottom of the panel. From

Page 247

[1] the top of the rib, it would be two and a half [2] inches.

[3] Q: So from the top of the old roof to the [4] top of the new roof, what's the difference?

[5] A: Okay. From the metal panel in which [6] there's standing ribs from the metal panel, it [7] would be four and three

quarters inches higher [8] than the metal panel surfaces.

[9] MR. BENEDICT: Page 26, Lines 12 [10] through 15.

[11] Q: Is the tie off covered by the [12] manufacturer's warranty?

[13] THE COURT: What page are you on?

[14] MR. BENEDICT: Page 26, Lines 12 [15] through 15.

[16] THE COURT: Thank you.

[17] MR. BENEDICT: It's like reading a [18] script back in high school for one-act plays. I [19] apologize, Your Honor.

[20] Page 26, Line 12.

[21] Q: Is the tie off covered by the [22] manufacturer's warranty?

[23] A: As of right now, there is no [24] manufacturer's warranty.

Page 248

[1] MR. BENEDICT: Moving to Page 29, [2] lines 24 and 25, continuing over on the next [3] page.

[4] Q: If this were your roof over 5150 Kansas [5] Avenue, would you be happy that this temporary tie [6] off exists on the top of the roof?

[7] MR. FRYE: Objection. That was a [8] question that called for speculation.

[9] And as to whether what this [10] gentleman would have been happy or not with regard [11] to that roof, I think is irrelevant for this [12] proceeding.

[13] THE COURT: Overruled. I'll allow [14] the answer based on his qualifications.

[15] MR. BENEDICT: We appreciate that, [16] Your Honor.

[17] ANSWER: No.

[18] Q: Why not?

[19] A: Well, first of all, the roof's not [20] complete. And I may, looking at it, be concerned [21] on how long it would stay watertight at that [22] line.

[23] Q: Why would you be concerned on how long it [24] would stay watertight at the line?

Page 249

[1] A: It doesn't look like it's completed.

[2] Q: How long will this temporary tie off seam [3] last?

[4] A: I don't know for sure.

[5] Q: Do you have an idea?

[6] A: We constructed it in early April. It had [7] functioned until the storm hit in late May, I [8] believe.

[9] I don't know how it's performed [10] since that time.

[11] Q: Okay.

[12] A: The seal relies on caulking.

[13] Q: Okay.

[14] A: And another storm, similar cir-



cumstances [15] would likely result in the leak again.

[16] **MR. BENEDICT:** Continuing forward, [17] Your Honor, I'm now on 32, beginning on Line 10.

[18] **Q:** After D.C. Taylor installed this [19] temporary tie-off seam, did D.C. Taylor return to [20] the roof over 5150 Kansas Avenue?

[21] **A:** Yes.

[22] **MR. BENEDICT:** Continuing on Line [23] 19.

[24] **A:** Fleming asked us to respond to a reported

Page 250

[1] leak along the tie-off line.

[2] **Q:** Okay.

[3] **A:** That date could be —

[4] **Q:** What did Fleming tell you about the [5] reported leak on the tie-off line?

[6] **A:** We were told that along the tie-off line, [7] there were five locations where the water was [8] entering the building.

[9] I've got the corrected data when we [10] responded. It was July 2nd.

[11] **MR. BENEDICT:** I'm now continuing [12] on Page 35, Your Honor, Lines 15 to 25.

[13] **Q:** You testified earlier that the temporary [14] tie-off seam is not a permanent fix; is that [15] correct?

[16] **A:** Correct.

[17] **Q:** Could you explain why?

[18] **A:** It's a — we don't believe it's [19] permanent, because we're trying to seal a flexible [20] membrane to a profile on a standing seam on a [21] roof. And it just doesn't lend itself well to do [22] that.

[23] Trying to seal and configure up the [24] ribs, down, up, down the rib, up, down.

Page 251

[1] **Q:** What is the use of life of that temporary [2] tie-off seam?

[3] **A:** It would be hard to say. We've already, [4] in two months, had one incident.

[5] **MR. BENEDICT:** Continuing on Page [6] 36, Lines 16 through 25.

[7] **Q:** Is caulking an appropriate fix of the [8] leaking over the temporary tie-off seam?

[9] **A:** Given the way we constructed the joint [10] with caulk, that would be how we would prepare it.

[11] **Q:** How long would that repair last?

[12] **A:** It would be hard to say if we had another [13] storm or similar circumstances, another event [14] could happen similar to what did happen.

[15] **Q:** Would caulking the repairs qual-

ify the [16] roof for a manufacturer's warranty?

[17] **MR. BENEDICT:** Continuing to the [18] next page.

[19] **A:** No.

[20] **Q:** Would leaving the temporary tie-off SEAM [21] qualify THE roof for manufacturer's warranty?

[22] **A:** I don't believe so.

[23] **MR. BENEDICT:** Line 5.

[24] **Q:** What type of repair to the five leaks in

Page 252

[1] the temporary tie-off seam would qualify the roof [2] for the manufacturer's warranty?

[3] **A:** I don't know what that would be short of [4] completing the job.

[5] **MR. BENEDICT:** Line 15.

[6] **Q:** How much would D.C. Taylor charge to [7] complete the roof?

[8] **A:** I think I made a proposal to John [9] Malinee. I don't have a copy of it with me.

[10] I don't remember the exact number, [11] but it was in the vicinity of 95 or \$98,000.

[12] **Q:** So in your opinion, to fix the roof, to [13] make the roof perform in its best capacity, and to [14] qualify the roof for manufacturer's warranty, what [15] must be done to the roof at the temporary tie-off [16] seam?

[17] **A:** To meet all those requirements, you'd [18] have to complete the project according to the way [19] we submitted it.

[20] **MR. BENEDICT:** I'm moving to Page [21] 51, Your Honor. I am sorry. It begins on Page [22] 50, Line 23 and continues.

[23] **Q:** Would it be your view, based on what you [24] know about the leaks — this apparently happened

Page 253

[1] in June of 2003 at five — the 5150 facility — [2] that they were caused by inadvertent workmanship [3] or failure of the membrane?

[4] **A:** It would be — it would have to be a [5] non-approved detail.

[6] **Q:** What do you mean by that?

[7] **A:** In other words, the way we had to tie [8] off.

[9] **Q:** "We", meaning D.C. Taylor?

[10] **A:** I'm sorry, in —

[11] **Q:** "We" meaning D.C. Taylor?

[12] **A:** Yes. In other words, to do the best we [13] could do to secure the roof from leaking and at an [14] unexpected tie-off point, we utilized basically [15] caulking and a bar seal, the membrane to the [16] panel. And that's not an approved detail

for the [17] manufacturer's warranty.

[18] **MR. BENEDICT:** I'm now returning to [19] Page 40, Line 20.

[20] **Q:** And you indicate that — that on July 2nd [21] your crew met with Joe Struempf on site to review [22] the situation. The situation, I presume, meaning [23] the repair of the roof after the heavy rain in [24] June?

Page 254

[1] **THE COURT:** What page are you on [2] now?

[3] **MR. BENEDICT:** I'm on Page 40, Line [4] 20 through 25.

[5] **THE COURT:** Okay.

[6] **MR. BENEDICT:** I tried to group [7] concepts together, Your Honor. That's why I'm [8] jumping around.

[9] **THE COURT:** That's all right.

[10] **Q:** And you indicate that on July 2nd, your [11] crew met with Joe Struempf on site to review the [12] situation. The situation, I presume, meaning the [13] repair of the roof after the heavy rain in June.

[14] That D.C. Taylor's people were [15] prepared to redo the caulking seal at the proper [16] location, but Mr. Struempf would not allow you to [17] do anything at the facility. Correct?

[18] Is that correct?

[19] **A:** Yes.

[20] **Q:** So it was your understanding that [21] Mr. Struempf was a Fleming employee?

[22] **A:** That was my understanding.

[23] **Q:** And how did you arrive at that [24] understanding?

Page 255

[1] **A:** He was my initial contact, and he was my [2] on-site contact through the course of the job.

[3] **Q:** Then Mr. Stegmann was in Texas, whereas [4] Mr. Struempf was in Kansas?

[5] **A:** Yes.

[6] **Q:** So on day-to-day matters related to these [7] facilities, you dealt with Mr. Struempf as opposed [8] to Mr. Stegmann?

[9] **A:** Through the course of the job, yes. He [10] was our on site contact.

[11] **MR. BENEDICT:** Now, moving through [12] the document to Page 63, Your Honor, Line 8 [13] through 17.

[14] **Q:** Did you indicate in your — did you [15] indicate, too, in your conversations that you [16] referred to with Mr. Stegmann that you were doing [17] the temporary tie off on the 5150 property that [18] we've been discussing?

[19] **A:** Yes.

[20] Q: Did he indicate — what was his response, [21] to the best of your recollection?

[22] A: He thought it was appropriate that we do [23] leave the facility prior to completing it, I told [24] him that we'd do the best we could to — best we

Page 256

[1] could in sealing to the existing roof where we [2] tied it off.

[3] MR. BENEDICT: May it please the [4] Court, that's all of the deposition that I have [5] designated.

[6] MR. FRYE: I do have a couple of [7] the exhibit pages to refer the Court to, Your [8] Honor.

[9] Beginning on Page 20, Line 22,

[10] Q: When did D.C. Taylor start working on the [11] roof over 5150?

[12] A: You mean actually start construction?

[13] Q: Right.

[14] MR. FRYE: Continuing onto the next [15] page.

[16] A: Mid-February, late February.

[17] Q: 2003?

[18] A: 2003. Possibly — possibly end of [19] March.

[20] Q: Okay. When did D.C. Taylor stop working [21] on the roof over 5250 Kansas Avenue?

[22] A: I believe our last reported date on the [23] site was April 11, 2003.

[24] MR. FRYE: I'll refer the Court to

Page 257

[1] Page 33, beginning at Line 5.

[2] Q: How did Fleming talking — this — [3] there's discussion about the reporting to the [4] facility on July 2nd after the leak.

[5] How did Fleming tell you to fix the [6] leaks at the five locations on the temporary [7] tie-off line?

[8] A: They didn't tell us how to fix it. They [9] asked us to go observe the situation and make [10] appropriate repairs.

[11] Q: Okay. Did D.C. Taylor observe the [12] situation?

[13] A: Yes, we did.

[14] Q: What were those observations?

[15] A: It appeared to us that additional [16] caulking or sealant would be required —

[17] Q: Okay.

[18] A: — from the report, from what my service [19] person said.

[20] Q: Okay. Did D.C. Taylor caulk those leaks?

[21] A: No, we did not.

[22] MR. FRYE: Referring to Page 36, [23] Line 16.

[24] Q: Is caulking an appropriate fix of a

Page 258

[1] leaking, over the temporary tie-off seam?

[2] A: Given the way we constructed the joint [3] with caulking, that would be how we would repair [4] it.

[5] Q: How long would that repair last?

[6] A: It would be hard to say. If we had [7] another storm of similar circumstances, another [8] event could happen similar to what did happen.

[9] MR. FRYE: I'm referring to Page [10] 55. I'm sorry, at Page 54, beginning at Line 4.

[11] Okay.

[12] Q: Now, did you have discussions with anyone [13] at Fleming regarding why they needed this roof on [14] 5150 done — redone?

[15] A: It was the roof. To a certain extent, I [16] believe their decision was relative to a storm [17] that happened in February, ice storm that happened [18] in February of 2002.

[19] Q: Who told you this or —

[20] A: I was asked to go review, personally [21] review the roofs after that storm.

[22] Q: And what — when did that occur?

[23] A: Excuse me. I believe that was late [24] February 2002.

Page 259

[1] Q: Who made that request of you?

[2] A: That would have been Dave Stegmann.

[3] Q: And did you then review the roof?

[4] A: Yes, I did.

[5] Q: What was the situation at the time on the [6] roof?

[7] A: There was — there was leakage that had [8] resulted during that ice storm, primarily in my [9] opinion, through the horizontal lapse of the [10] panels.

[11] Q: Did you then make a recommendation how to [12] ensure that this didn't happen again?

[13] A: I didn't recommend anything as far as [14] repair. He asked me for —

[15] Q: He meaning?

[16] A: Dave Stegmann asked me for a proposal to [17] put the new roof on.

[18] Q: Did Mr. Stegmann indicate that the roof [19] needed to be used for a purpose other than for [20] office space or dry warehouse space?

[21] A: Yes. He told me that the possibility [22] existed that they would question.

[23] Q: "They" meaning?

[24] A: Fleming would assert, or excuse me, would

Page 260

[1] possibly convert portions of that space into [2] refrigerated use area.

[3] Q: Was it your understanding that that [4] decision had not yet been made based on your [5] conversation with Mr. Stegmann?

[6] A: Based on my conversation, it was a [7] possibility.

[8] MR. FRYE: Referring to Page 56, [9] Line 13. Actually that would be Line 1.

[10] Q: The roof that was being installed on [11] 5150, I believe you testified earlier was [12] significantly better insulated. The new roof [13] would have been that the old roof, correct?

[14] A: Correct.

[15] Q: Would that insulation or could that [16] additional insulation serve a refrigerated [17] warehouse or the new roof? I'm sorry.

[18] A: At his request we —

[19] Q: "His" meaning?

[20] A: Dave Stegmann's.

[21] Q: Okay.

[22] A: We installed an amount of insulation that [23] he believed would be appropriate for refrigerated [24] space in the 36-degree temperature.

Page 261

[1] Q: Would it also be appropriate for a space [2] with what we'll call ambient temperature, you [3] know, 70 degrees, approximately?

[4] A: Sure. That would be appropriate.

[5] Q: Would it save energy costs with that much [6] insulation, in your opinion?

[7] A: If it was air-conditioned, it would. In [8] Kansas City as far as heating, most people don't [9] heat warehouses much more than 60 degrees. There [10] would be some saving.

[11] MR. FRYE: Onto the next page.

[12] Q: And it gets very hot, I presume, in the [13] summer at Kansas City at times, correct?

[14] A: Correct. Yes.

[15] Q: Would it also serve to keep heat in the [16] warehouse, or office, or whatever is below the [17] roof on 5150 in wintertime?

[18] A: It would do better, yes.

[19] MR. FRYE: That's all I have.

[20] MR. BENEDICT: I'm wearing a pad [21] in the carpet back to the podium, Your Honor. I'm [22] now on Page 64 of the deposition, Lines 15 to 25.

[23] Q: You testified earlier that around

[24] February 2003, Dave Stegmann called and said, Hey,

Page 262

[1] we have a leak in the roof at 5150 Kansas Avenue. [2] Is that correct?

[3] A: That would have been 2002.

[4] Q: 2002. Did you go out there and observe [5] that leak?

[6] A: A couple days later after the ice had [7] gotten off the roof.

[8] Q: And I think you testified in your opinion [9] that leakage resulted from a horizontal lapse of [10] the panels; is that correct?

[11] MR. BENEDICT: Continuing to the [12] next page.

[13] A: Yes.

[14] Q: Okay. And then later in July, around [15] July 2nd, 2003, D.C. Taylor Company at the request [16] of Fleming went out to inspect the roof with the [17] temporary tie-off seam; is that correct?

[18] A: Yes.

[19] Q: And you were told to — in respect to the [20] roof at the tie-off seam, because the tie-off seam [21] was leaking in five spots; right?

[22] A: That's what we were told, yes.

[23] Q: Those five spots were different than the [24] leak that was reported to you February 2003;

Page 263

[1] correct — or 2002, correct?

[2] A: I would expect that to be the case.

[3] MR. BENEDICT: Thank you, Your [4] Honor.

[5] THE COURT: All right. Anything [6] more by DEC or Shield?

[7] MR. BENEDICT: Your Honor, if it [8] please the Court, I would like to call Mr. Malinee [9] as a rebuttal witness just to authenticate the [10] Exhibit Number 69.

[11] THE COURT: You may, [12] You're still under oath.

[13] MR. BENEDICT: If it please the [14] Court, I'd like to approach the witness with [15] Exhibit Number 69.

[16] THE COURT: Yes.

[17] BY MR. BENEDICT:

[18] Q: Mr. Malinee, I have handed to you what is [19] marked as Exhibit Number 69. Can you identify [20] that document, please?

[21] A: I can. It's evidence and certificate of [22] insurance identifying the certificate holder as [23] DEC Investments, LLC.

[24] Q: And what time period does that —

Page 264

[1] A: For a —

[2] Q: — Certificate cover?

[3] A: For a period of August 1st, 2001 to [4] August 1st, 2002.

[5] Q: And would that certificate of insurance [6] have been in effect during the ice storm in [7] February of 2002?

[8] A: It would have.

[9] Q: Okay. And have you seen that document [10] before, sir?

[11] A: Yes, I have.

[12] Q: Is that contained in your files?

[13] A: It is.

[14] Q: And where did you get that document?

[15] A: From our files at Intermobile.

[16] Q: And where did Intermobile require that [17] document? Did Fleming provide that to them as [18] evidence of proof on the building to Intermobile?

[19] A: The document came from Marsh, U.S.A., who [20] is the broker for Fleming. And it identifies [21] Fleming Companies as the insured.

[22] Q: And under that document, DEC is the [23] certificate holder?

[24] A: That is correct as required by the

Page 265

[1] lease.

[2] Q: Has Intermobile Marketing, on behalf of [3] DEC Investments, received any proceeds of [4] insurance from the claim filed by the Debtors?

[5] A: Not to the best of my knowledge.

[6] MR. BENEDICT: Thank you, Your [7] Honor. No other questions.

[8] THE COURT: Any cross?

[9] MR. FRYE: No, Your Honor.

[10] THE COURT: Thank you. You may [11] step down.

[12] MR. BENEDICT: I believe Your Honor [13] indicated you wanted to wait until the end for [14] admissibility of exhibits.

[15] THE COURT: Well, until the end of [16] your case.

[17] MR. BENEDICT: I'm going to move to [18] admit all of the exhibits I have identified, and [19] we can go down the exhibits.

[20] THE COURT: Well, are there any [21] objections to your —

[22] MR. FRYE: Yes, Your Honor. We [23] would object to the Blackburn report that has been [24] identified by Mr. Benedict. There's been no

Page 266

[1] foundation laid as to the admissibility of that [2] report.

[3] And certainly, Mr. Blackburn is not [4] here to authenticate it.

[5] Additionally, with regard to the [6] Exhibit Number 69, while no doubt it is a

record [7] maintained by Intermobile in the ordinary course [8] of business, the statements that are made in the [9] record by the insurance company, Mr. Malinee has [10] no personal knowledge of.

[11] We would ask that at least for those [12] purposes, that the Court not consider that exhibit [13] for the truth of the matter served here, the [14] statements contained in that exhibit.

[15] THE COURT: As to who is the [16] certificate holder and who is the insurer?

[17] MR. FRYE: No, that I think that we [18] can — we will — we have no problem with that.

[19] THE COURT: I don't know what else [20] is in Exhibit 69.

[21] MR. FRYE: Okay. That's it. [22] That's fine.

[23] THE COURT: It's a certificate of [24] insurance, as far as I know.

Page 267

[1] MR. BENEDICT: And Your Honor, [2] that's the only purpose for which we're offering [3] the exhibit.

[4] THE COURT: All right.

[5] MR. BENEDICT: And Your Honor, with [6] respect to the Blackburn Exhibit, we are not [7] offering it for the truth of the matter. It is [8] being offered for notice purposes.

[9] It was presented to a Fleming [10] employees, who the knowledge of the conclusions [11] were consistent with Fleming's conclusion with [12] respect to the roof.

[13] MR. FRYE: I don't believe that was [14] the testimony at all, Your Honor. The testimony [15] was — it was presented if any — to anyone, to [16] Mr. Stein at D.C. Taylor. I don't believe the [17] testimony, that Fleming concurred with any of [18] those conclusions.

[19] MR. BENEDICT: If it please the [20] Court, Mr. Malinee testified that he presented a [21] copy to Mr. Struempf as well as to Mr. Stein. [22] That he provided a copy to Mr. Struempf between [23] July 9th and July 15th. The exact date could not [24] be ascertained through the testimony, though.

Page 268

[1] And that Mr. Struempf indicated that [2] these are the exact same conclusions that [3] Fleming's expert —

[4] THE COURT: Well, Stein came up, [5] but not —

[6] MR. BENEDICT: Stein had —

[7] THE COURT: Well, for that purpose, [8] I'll admit it. But not —

[9] MR. BENEDICT: And for no other [10] purpose. That's all we're asking it be admitted [11] for for notice purposes.

[12] And if it please the Court, I have [13] no objection to the exhibits of Fleming as [14] contained in their exhibit binder.

[15] MR. FRYE: Yes, we move them.

[16] MR. BENEDICT: We'll stipulate to [17] the admissibility of all those exhibits as well.

[18] THE COURT: Then I'll admit all the [19] exhibits identified today.

[20] MR. BENEDICT: Thank you, Your [21] Honor. And DEC and Shield now rest.

[22] THE COURT: Does the Debtor have [23] any witnesses?

[24] MR. FRYE: We've already put on our

Page 269

[1] case through Mr. Stegmann, Your Honor.

[2] THE COURT: All right, [3] Could I see a copy of 69? Did the [4] witness leave it up here?

[5] MR. BENEDICT: It's been left on [6] the counter, Your Honor.

[7] THE COURT: Well, let me hear from [8] the Debtor regarding the insurance issue that's [9] been raised by DEC.

[10] MR. ORGEL: Your Honor, we were [11] prepared to discuss the motion to reject. We have [12] not talked with our — we have not — this wasn't [13] raised until today in Court.

[14] There aren't people we've called to [15] ask. We have Mr. Stegmann here.

[16] As he indicated, while he may have [17] passed this on, he didn't prepare it. There's a [18] group that does that.

[19] All we can say is there's mistakes [20] in that document. We'll have to discuss it [21] internally and decide whether we have to call the [22] insurance company, whether we owe them money [23] back.

[24] We just don't see that as a matter

Page 270

[1] for today.

[2] THE COURT: Well, tell me whether I [3] have to refer it to the U.S. Attorneys' Office.

[4] MR. ORGEL: Your Honor, I don't [5] know more than I've heard today. We're going to [6] try to find out internally.

[7] Was there a mistake made? And if [8] so, we'll contact the insurance company and [9] correct it. I don't even know if it changes [10] anything. I do believe that we did spend the [11] money.

[12] Most of the roof was repaired on [13] all — on 5300. I think there is testimony before [14] you that the roofer decided to apply some of the [15] money applied on — paid on this roof to the [16] unpaid balance on 5300.

[17] But as far as we knew, we paid fully [18] for this roof. So to the extent, there was [19] insurance, one way or another, it's for —

I don't [20] know if it's for exactly the amount we paid for, [21] 98,000 or what. We don't have that before us [22] today.

[23] Because it came up so late with [24] insurance, we don't have all the facts.

Page 271

[1] MR. BENEDICT: Your Honor, if I may [2] respond.

[3] THE COURT: Well, what can you shed [4] on this?

[5] MR. BENEDICT: The only item I [6] wanted to point out to Your Honor was that the [7] issue of insurance was raised by the Debtors [8] their defense that this was a preexisting issue [9] that was covered by insurance and was not an issue [10] that arose postpetition.

[11] And so they are the ones that [12] produced these documents to me as a part of [13] their — it was a prepetition event covered by [14] insurance.

[15] So to the extent that that's what [16] they've been arguing to this Court since at least [17] July 17th, I don't think it's a new issue. And [18] quite frankly, simply put, I don't have a full [19] roof on my facility. And if it was covered by [20] insurance, I should have received those insurance [21] proceeds to ensure that my roof was completed.

[22] If it was an insurable event, which [23] I think that this particular is postpetition. But [24] one way or another, we think the Debtor is

Page 272

[1] responsible for paying for the completion of the [2] roof.

[3] MR. ORGEL: Your Honor, I don't see [4] how that's really responsive. I mean, yes, it was [5] covered by insurance.

[6] Yes. We put in an insurance claim, [7] I don't think there's any question about that.

[8] I thought the question Your Honor [9] was asking me what about this fact, it said sole [10] owner and shouldn't have, and what about the fact [11] that we may have gotten the money postpetition, [12] and what happened to it?

[13] And those are things that came up [14] today, and I don't — and Mr. Stegmann indicated [15] he didn't know what happened to the money. I [16] can't explain whether it was dollar for dollar.

[17] And I don't know that that was to [18] the extent we were raising it, that this is a [19] prepetition event, I think everything that we've [20] heard today is consistent with that, that the [21] repair began prepetition, that we put in an [22] insurance claim.

[23] I thought we were going to the issue [24] that there's some notion of what happened with the

Page 273

[1] insurance proceeds. And all we're noting is as to [2] what happened with the proceeds.

[3] I just don't have the right people [4] before you in court today to ask that question of.

[5] THE COURT: Well, my question was [6] addressed in both, what happened to the proceeds, [7] and what about the possible error in the insurance [8] submission?

[9] MR. ORGEL: I'm not sure, Your [10] Honor, whether that makes a difference or not, [11] That's the other question we have to ask.

[12] We may have to tell the insurance [13] company. I'm not sure whether it changes.

[14] If we — to the extent we paid for [15] the repair, I think it was.

[16] THE COURT: I don't know if it [17] changes this, that I have an obligation to a crime [18] that has been committed to refer it to the U.S. [19] Attorney, or if somebody suggests that a crime has [20] been committed.

[21] MR. ORGEL: Yes.

[22] THE COURT: I'm obligated. I'm not [23] the one that investigates or makes a decision on [24] that issue.

Page 274

[1] MR. ORGEL: Yes, Your Honor. As [2] I've indicated, as soon as I heard this, I noted [3] we have to go back and ask what is this? And we [4] have to call the insurance company, tell them we [5] aren't the sole owner.

[6] I just don't know the impact of [7] that. I don't know whether it makes a difference [8] in how much they reimburse us or not, if these [9] were monies we contracted to pay for the roof [10] repair.

[11] MR. FRYE: For one point in [12] clarification, the amount there, the one million [13] 109 or however much it was for the damage to both [14] the 5150 roof and the 5300 roof combined, that's [15] the total amount of the two purchase orders [16] combined.

[17] THE COURT: Well, I note there [18] wasn't an attachment, so I'm not sure what the [19] breakdown of the insurance claim was.

[20] MR. ORGEL: Your Honor, if I may, [21] I think that it may be time to go to the argument of [22] what these facts mean. If you don't have a [23] preference, I know I got an opportunity to start [24] with this

Page 275

[1] THE COURT: Well, let me ask when [2] our next Fleming hearing is.

[3] MR. BENEDICT: September 4th.

[4] THE COURT: Next Thursday.

[5] MR. ORGEL: Your Honor, if it [6] helps, my argument will be about ten minutes, [7] maybe 12.

[8] MR. BENEDICT: Actually I wanted to [9] ask a procedural question with regards to our [10] claims for attorneys fees, Your Honor.

[11] THE COURT: Yes.

[12] MR. BENEDICT: And I don't want to [13] put the cart before the horse, but it seems to me [14] that if I prevail, that these are obligations [15] under the lease, which we put on evidence of the [16] lease, and we're entitled to the attorneys fees. [17] Then the witness, obviously, can't testify to the [18] validity of those fees.

[19] Then we have included in the binder [20] our attorney fees statements, which were incurred [21] by my law firm. And again, I did not know how [22] Your Honor wanted to proceed with regards to that.

[23] THE COURT: Well, is there — what [24] are the exhibit numbers for that? I guess.

Page 276

[1] there's no objection to those being made a part of [2] the record.

[3] MR. BENEDICT: No, Your Honor. We [4] are redacting any confidential attorney-client [5] items of those prior to submission to the Court in [6] connection with our proceeding.

[7] The invoices for the attorney fees [8] are Exhibit Number 47 and 48 in the first book. [9] And Exhibit Number 49 in the second book.

[10] And to just quantify those for Your [11] Honor, I think this might be of assistance to all [12] of us. I've gone back to Exhibit 58 and tabulated [13] all of the items that we have requested we be [14] reimbursed for. So we can quantify that so we [15] understand what it is that DEC and Shield are [16] asking for.

[17] With respect to those items that [18] we've identified on Exhibit 58, which are those [19] items we believe were the Debtors' obligations to [20] perform during the month of July through the [21] rejection of the lease, whenever that date is, [22] those expenses totaled \$49,727.71.

[23] Those do not include, and I have [24] excluded any of the claims for the locksmith in

Page 277

[1] that total. The attorney fees included in those [2] various exhibits I've now identified to you [3] through July 15th, not including preparation for [4] this hearing attendance here today, including my [5] local counsel's fees, up through, I believe, June [6] was

\$114,672.94, for a total requested under the [7] lease at this time of \$164,400.65, plus whatever [8] cost and expense we've incurred preparing for and [9] attending for this hearing.

[10] THE COURT: All right. I'll admit [11] Exhibits 47 to 49.

[12] MR. BENEDICT: Thank you.

[13] THE COURT: Let me hear the [14] Debtors' argument.

[15] MR. ORGEL: Your Honor, as to the [16] fact I think we — as far as the Debtors are [17] concerned as to both the access issue, and the [18] corridors issue, the curb site issue and the [19] corridor, the facts show that any requirement [20] deconstruct connecting corridors are to provide [21] access, arise only under the prepetition lease as [22] part of the surrender obligation clauses.

[23] DEC and Shield have argued in their [24] papers that surrender is a condition of

Page 278

[1] rejection. Pursuant to Section 365(d)4.

[2] The Debtors' position is that [3] they're wrong. The statute didn't make it a [4] condition.

[5] The statute says under 365(d)4 which [6] really isn't what's at issue here, because that's [7] the automatic rejection section.

[8] The only place it's mentioned is [9] that the trustee shall immediately surrender, and [10] the trustee shall immediately surrender, so the [11] lease is redeemed rejected, and the trustee should [12] be immediately surrendered.

[13] As I've indicated both the Kansas [14] District court case, the Duckwall case looked at [15] that and found that that wasn't a condition of [16] rejection. The only conditions to rejection [17] discussed in the case law, or if the Debtor asks [18] that the rejection be made retroactive and their [19] conditions to retroactivity imposed as an [20] equitable imposition by the Court to obtain that [21] retroactivity. And that's discussed in the At [22] Home case submitted in our case.

[23] THE COURT: Well, you were seeking [24] retroactivity, were you not, by your motion?

Page 279

[1] MR. ORGEL: Yes, Your Honor. You [2] said take that into account as to the amount of a [3] retroactivity. But as I understand it, we passed [4] the point.

[5] The Debtors were prepared to proceed [6] to July 31. You might think that retroactively, [7] considering that we're today, but we're [8] considering on a hearing from July 17th. Having [9] had the motion filed July 2nd and a hearing on

[10] July 17th, we don't think the equities are such [11] that we should be, as the Court indicated in At [12] Home, and did not in At Home require that [13] surrender proceed rejection.

[14] We don't think it's appropriate that [15] for our July 31 rejection that we be required to [16] have done more than we have, which is then vacated [17] by that date and not have to surrender under state [18] law. And in fact, Your Honor, the case law on [19] when surrender under state law is relevant is when [20] Debtors have said, We surrender.

[21] So even though we haven't rejected, [22] we shouldn't pay rent and Courts have then looked [23] and said, Well, wait. You really haven't [24] surrendered, so 365 applies.

Page 280

[1] And by the way, Your Honor, this was [2] the Slim Life Weight Loss Centers case at 182 BR [3] 701.

[4] THE COURT: Read that cite again.

[5] MR. ORGEL: 182, BR 701. That's a [6] District Court of New Jersey.

[7] I'm sorry, Bankruptcy Court of New [8] Jersey.

[9] And there, the Debtor had tried to [10] say, because it had vacated before rejecting, that [11] the administrative obligation ended early, and the [12] Court said in that case, I look at whether you [13] surrendered under state law. And under state law, [14] surrender includes an acceptance of the premises [15] by the landlord, and you're vacating doesn't equal [16] that.

[17] So administrative rent got charged [18] on total rejection. Some of what has been asked [19] for is, in effect, specific performance of these [20] surrender obligations, specific performances [21] completely contrary to what 365 is about, which is [22] enabling the Debtors to escape the burden of [23] burdensome executory contracts.

[24] Precisely on that basis, the Court

Page 281

[1] in In Re: Fleishman stated when faced with a [2] similar situation, and I believe it's an option [3] setting, nor will Jacobs be able to enforce this [4] contract right with the remedy of specific [5] performance. Specific performance should not be [6] permitted where the remedy would have, in effect, [7] done what 365 meant to avoid.

[8] That is, impose burdensome contracts [9] on the Debtor. And that's at 138 BR 641.

[10] That's a Bankruptcy Court in [11] Massachusetts. It's a similar effect with a [12] Southern District of New York, In Re: Bradlees.

[13] **And In Re:Bradlees,** administrative [14] rent was again sought. And the Court found [15] Westbury is not entitled to an administrative [16] claim against the Debtors by virtue of the [17] Debtors' alleged breach of a prepetition [18] contract.

[19] Again, where a specific performance [20] was asserted making surrender obligations [21] administrative expenses, which is what's being [22] asked, is not supported by the Bankruptcy Code or [23] by case law. And making these administrative [24] expenses here, based on the facts you've heard

Page 282

[1] will saddle this estate with an obligation to pay [2] rent on the Shield property until it can grant [3] access.

[4] There's no assurance as to when that [5] can happen. The testimony was that last time it [6] took two to three to four months.

[7] We don't know whether it will happen [8] this time. There were two testimonies as well [9] that there's two ways to get access.

[10] One way is to go to the city and try [11] and cut a new curb. The other was that the Shield [12] property is next to the DEC property, and they [13] showed that there was possible — possibly a way [14] to get this through the DEC property.

[15] But there were no — that was the [16] testimony that said, but there's no docks there. [17] And how they then — and the floor wouldn't be the [18] right light. But there was a parking lot they [19] were talking about they could come through.

[20] **THE COURT:** That's not Shield's [21] property.

[22] **MR. ORGEL:** That's not Shield's [23] property. The question would be who's in a [24] better — if Shield is suggesting that one of the

Page 283

[1] things, Your Honor, should look at, and I believe [2] they did this in their papers, that the Debtor is [3] in a better position to negotiate with the [4] neighboring, —

[5] **THE COURT:** The drill.

[6] **MR. ORGEL:** — the landlord on the [7] other side.

[8] **THE COURT:** Right.

[9] **MR. ORGEL:** Certainly the Debtor's [10] not there. We'd point out that there's another [11] opportunity, which is to negotiate with the [12] Debtor.

[13] And the only evidence before the [14] Court on that is that DEC shared a general partner [15] with Shield. That DEC had the same person who [16] was — who signed the Shield and the DEC [17] contracts.

[18] Meaning the only evidence before you [19] is that we have no contacts with

DEC or Shield [20] other than appearing in Court, and that they may [21] have some, though, we don't know what those are [22] exactly.

[23] My only point being, Your Honor, [24] we'd be saddled with that obligation, and there's

Page 284

[1] no evidence that we have a better ability to deal [2] with this problem than the landlord. And we [3] certainly think there's no real obligation to deal [4] with it.

[5] And I will reiterate something I [6] said before, Your Honor, which is if you impose [7] this on the Debtors as a matter of law, as opposed [8] to as a matter of sort of what's equitable in the [9] context of this rejection, really there's no [10] distinction between this Debtor and a Chapter 7 [11] trustee.

[12] If the lease — if on April 1st, [13] this lease, we have a partially completed roof [14] with access problems, I say these properties with [15] those problems, if the trustee, Chapter 7 trustee [16] got out, came with an emergency motion and [17] rejected, the same arguments can be made that are [18] being made today, saying he should spend the money [19] to comply with surrender obligations.

[20] To the extent that it's the Debtors' [21] continued occupancy and conduct of the auction, [22] those were taken care of in the auction motion, [23] And in fact, they came in and we stipulated, and a [24] lot's been done.

Page 285

[1] So despite some of the [2] characterizations that the Debtor's attitude — [3] the Debtor, I think the facts have shown, put [4] somebody on the premise, hired somebody in Kansas [5] as a consultant, Mr. Struempf, after his [6] employment ended on July 11th to make sure this [7] property got turned over properly.

[8] And there's been discussion and [9] agreement that the Debtor would pay certain of the [10] expenses. Your Honor, we acknowledge that the [11] repair and maintenance on this —

[12] **THE COURT:** Look. The payments [13] haven't been made.

[14] **MR. ORGEL:** But there's been [15] discussion leading up to this, Your Honor. This [16] is — we were in Court only a few weeks after some [17] of these expenses were incurred. You're talking [18] about some of the expenses. We are talking about [19] what were incurred in mid and late July because —

[20] **THE COURT:** I didn't hear you in [21] any of your papers say that you were going to pay [22] these.

[23] **MR. ORGEL:** We already told the [24] other side some we will pay. They put one on the

Page 286

[1] record.

[2] **MR. FRYE:** Enviro.

[3] **MR. ORGEL:** The Enviro claim.

[4] **THE COURT:** Yeah. They put it on. [5] I didn't hear from you.

[6] **MR. ORGEL:** They put on the record [7] that we'd pay it. We stipulated to that earlier [8] in this proceeding.

[9] **MR. FRYE:** I don't think we [10] stipulated, but we informed DEC's counsel that we [11] would pay for the cleaning of the floors. That [12] was Friday.

[13] **THE COURT:** Well, what part of [14] Exhibit 58 are you willing to pay?

[15] **MR. ORGEL:** The Enviro is \$5,000. [16] And I mean, Your Honor, if I can look at Exhibit [17] 58, I mean, coming to the end of it, Your Honor, [18] meaning what were we — we proposed utilities [19] prorated to the 31st. We pay all utilities [20] prorated through the 31st.

[21] I think we saw some of them went [22] into August. Some of the utilities were for some [23] of the bills they submitted, which went past July [24] 31st. We prorated to July 31st and paid.

Page 287

[1] I believe — I'm just going down — [2] the legal fees —

[3] **THE COURT:** Why wasn't this done [4] before you got to court?

[5] **MR. ORGEL:** Your Honor, but that [6] can be asked. You're right.

[7] **THE COURT:** I mean, why do I waste [8] my time listening to you, the direct examination [9] and cross-examination as to each and every one of [10] these bills? Why am I doing that?

[11] **MR. ORGEL:** Your Honor, I'm not [12] disagreeing. Part of the reason why the curb [13] issue, the access issue, and the corridor issue [14] for us was a much bigger issue, it's much bigger [15] numbers than all of these. If these were what we [16] were talking about, we believed we could come to a [17] ready settlement.

[18] But that's not what we've been [19] talking about. Which is why I wanted to first [20] deal with the curb, and the access, and curb [21] issue, and the corridor issue, because those [22] issues which fundamentally, you know, triple the [23] cost to the estate or quadruple it, and leave it [24] wide open with ongoing rent obligations is a much

Page 288

[1] more different, difficult problem. We couldn't [2] reach agreement because of that.

[3] Because the Debtor didn't believe [4] that it should not be paying rent going forward, [5] while access is sought, should not have to change [6] the curb. [7] I agree that many of the rest of [8] these I'm not disagreeing, Your Honor, I don't [9] think that a lot of this was material. [10] The doors —

[11] **THE COURT:** What about the — tell [12] me about the roof. What's your position on the [13] roof?

[14] **MR. ORGEL:** You know, the roof is [15] tougher, Your Honor. But we understand there's [16] \$98,000 sitting in an escrow after the last [17] hearing.

[18] Your Honor, our position is having [19] not reached a settlement on these other issues, [20] our position had to be that this was something [21] started prepetition. We've tried to accommodate.

[22] We were willing to —

[23] **THE COURT:** Well, given Mr. Stein's [24] testimony, do you still believe that this is an

Page 289

[1] issue that started prepetition?

[2] **MR. ORGEL:** Oh, absolutely, Your [3] Honor. I understand where Your Honor is going.

[4] The fact that there were leaks in [5] the caulking does not mean that that was a finish [6] job. Your Honor, if we didn't caulk it, if we [7] didn't caulk it at all, if on April 1st when he [8] indicated that they started at latest at late [9] March, so if April 1st he just walked off the job, [10] and we rejected the lease April 1st, the first day [11] that we walked in, they would have just had a big [12] gaping hole.

[13] How our liability goes up by [14] caulking that gaping hole seems to me —

[15] **MR. BENEDICT:** I'm going to [16] object. There was no testimony as to a gaping [17] hole in the roof, it seems — sounds to me like [18] he's arguing from facts that are not in the [19] record.

[20] **MR. ORGEL:** I believe you admitted [21] all the pictures. There's a picture as of April [22] 1st that shows it.

[23] **THE COURT:** The roof?

[24] **MR. FRYE:** No.

Page 290

[1] **MR. BENEDICT:** There's no picture [2] of a hole in the roof, Your Honor.

[3] **MR. ORGEL:** It's a hole.

[4] **MR. FRYE:** It's a tile.

[5] **MR. ORGEL:** One second. [6] Your Honor, it is correct. There's [7] no evidence as to what it would look like without [8] the tie off. But, Your Honor, what's being asked [9] is to postulate that they'd be better off without [10] the tie off than with it. That's what the [11] argu-

ent is that we should be worse off having [12] done the tie off, suggesting they'd be better off [13] without it.

[14] It's inconceivable to me, Your [15] Honor. The reason I think Mr. Stein in his [16] testimony didn't — he indicated that before he [17] left, they agreed to tie it off. I don't think [18] they did that to make things worse.

[19] I think it's reasonable from the [20] evidence submitted to assume the reason they did a [21] tie off is because it was worse not to tie it [22] off.

[23] So my point is —

[24] **THE COURT:** Well, no. The

Page 291

[1] evidence, though, is that the leak occurred [2] postpetition at the tie off.

[3] **MR. ORGEL:** Yeah. Yes, Your [4] Honor. [5] But our obligation is to repair the [6] roof, not a particular leak. So if we had taken [7] off the roof, if we'd removed the roof to put a [8] new one on on March 31st, we removed the roof, so [9] we had an obligation to replace, would that become [10] an administrative obligation on April 1st? What [11] I'm trying to understand, Your Honor, —

[12] **THE COURT:** No, but you were in [13] possession of the premises after April 1st —

[14] **MR. ORGEL:** Yes.

[15] **THE COURT:** — for a period of [16] time.

[17] **MR. ORGEL:** Yes.

[18] **THE COURT:** And if on April 1st [19] there was no roof, but no rain occurred until [20] April 7th, I think your obligation to put on a new [21] roof would have occurred April 7th, wouldn't it?

[22] **MR. ORGEL:** No, Your Honor. My [23] obligation to put on a new roof took the moment we [24] took it off.

Page 292

[1] **THE COURT:** But was continuing —

[2] **MR. ORGEL:** Now, that's — now, I [3] understand what Your Honor is saying. Your Honor, [4] the only thing that changed was there was rain.

[5] Cleaning up the rain may be a [6] postpetition — the damage caused by the rain may [7] be the postpetition obligation. But if Your Honor [8] is going to follow Montgomery Ward, Montgomery [9] Ward which went through and rejected proring and [10] said, We have to look literally at 365(d)3.

[11] **THE COURT:** Well, if we do that, [12] the leak occurred June 26th.

[13] **MR. ORGEL:** But what are — are we [14] fixing the leak or the roof?

[15] **THE COURT:** Well, you didn't do [16] either.

[17] **MR. ORGEL:** Well, but Your Honor, [18] we are prepared — we're still prepared to have [19] the leak — the hole in the caulking —

[20] **THE COURT:** But that's not what [21] your witness testified to. Mr. Stein testified he [22] was told not to caulk it —

[23] **MR. ORGEL:** Right. Wait.

[24] **THE COURT:** — by Mr. Struempf, the

Page 293

[1] Debtor.

[2] **MR. ORGEL:** And the reason I'm [3] trying to be careful, Your Honor, is we're still [4] prepared to caulk it. Our understanding was — [5] our understanding was, and that's why there was [6] testimony from Mr. Malinee that we tried to get [7] out that he had a conversation.

[8] **MR. BENEDICT:** That they tried to [9] get out. There was no testimony —

[10] **THE COURT:** Please don't interrupt.

[11] **MR. ORGEL:** All I am going to say [12] is what he said was he had a conversation with [13] Mr. Stein, and that he told Mr. Stein to consult [14] his attorney before he went forward.

[15] That's all he would say. My [16] point —

[17] **THE COURT:** But Mr. Stein said, Mr. [18] Struempf told me not to fix it. He didn't tell me [19] to fix it.

[20] **MR. ORGEL:** Mr. Malinee's testimony [21] was Mr. Stein said he wanted a consensus. Having [22] not obtained a consensus —

[23] **THE COURT:** Yeah. The Debtor told [24] him not to fix it. That's what he identified in

Page 294

[1] the deposition is telling him not to fix it.

[2] **MR. ORGEL:** Your Honor, that was [3] read in from Mr. Stein's testimony. And our [4] problem is we don't have rebuttal for that [5] statement.

[6] But there's inconsistent statements [7] in the record today. The inconsistent statement [8] is that when Mr. Malinee had a conversation with [9] Mr. —

[10] **MR. BENEDICT:** Are we going to have [11] counsel testify again?

[12] **THE COURT:** Please don't interrupt.

[13] **MR. BENEDICT:** My apologies, Your [14] Honor.

[15] **MR. ORGEL:** I'd be happy to have [16] Mr. Malinee's testimony regarding the testimony of [17] Mr. Stein read back. I believe that what it would [18] show is that there were many efforts to get out [19] what was said, and that all that came out was that [20] Mr. Stein did ask if there was a conversation, [21] what was going to take place with respect to [22] repairing the roof at this point.