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U.S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MS  
FILED  
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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

In re:	)	CHARLENE J KENNEDY
	)	CLERK
MISSISSIPPI CHEMICAL	)	
CORPORATION, et al.	)	BY _____ DEPUTY
	)	CASE NO. 03-02984 WEE
	)	Chapter 11
Debtors.	)	Jointly Administered
_____	)	

**The United States' Motion To Compel Debtor  
to Assume or Reject Executory Contract**

The United States of America, on behalf of the Defense Energy Service Center (DESC) moves for an order compelling MissChem Nitrogen LLC (Debtor) to assume or reject its contract for production and storage of dinitrogen tetroxide (N2O4) with the government immediately so that the United States can make decisions that are vital to the country's national defense and aerospace program. An immediate decision on assumption or rejection is not only in the best interests of the United States, it is in the Debtor's best interest as it allows for continuing performance and payment on a \$25 million contract, thus providing valuable income for the Debtor's estate. Indeed, upon assumption of the Contract, the United States is prepared to accelerate performance under the Contract by ordering and buying almost all quantities of N2O4 needed through 2007, thus providing greater cash flow to the Debtor. The Debtor has indicated it supports the United States' Motion.

Wherefore, for the reasons set forth above, and more fully set forth in the attached Memorandum in Support of Motion to Assume or Reject Executory Contract, the United States requests that the Court enter an Order requiring the Debtor to Assume or Reject the N2O4 Contract within 15 days

85.

Respectfully submitted,

THE UNITED STATES OF AMERICA

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Assistant Attorney General

DUNN LAMPTON  
United States Attorney

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A handwritten signature in cursive script, reading "Brendan Collins", is written over a horizontal line.

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Attorneys for the United States

June 12, 2003

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

In re:	)	
	)	
MISSISSIPPI CHEMICAL	)	
CORPORATION, et al.	)	CASE NO. 03-02984 WEE
	)	Chapter 11
Debtors.	)	Jointly Administered
	)	

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**The United States' Memorandum in Support of Motion  
To Compel Debtor to Assume or Reject Executory Contract**

The United States of America, on behalf of the Defense Energy Service Center (DESC) moves for an order compelling MissChem Nitrogen LLC (Debtor) to assume or reject its contract for production and storage of Dinitrogen tetroxide (N2O4) with the government immediately so that the United States can make decisions timely that are vital to the country's national defense and aerospace program. An immediate decision on assumption or rejection is not only in the best interests of the United States, it is in the Debtor's best interest as it allows for continuing performance and payment on a \$25 million contract, thus providing valuable income for the Debtor's estate. Upon assumption of the Contract, the United States is prepared to accelerate performance by placing orders and buying almost all quantities of N2O4 need through 2007, thus providing greater cash flow to the Debtor. The Debtor has indicated it supports the United States' Motion.

**I. Relevant Facts**

**A. Contract SP0600-02-D0150**

DESC is a Department of Defense (DoD) Logistics Support Organization under the command of the Defense Logistics Agency (DLA). See Declaration of Sharon Murphy at ¶1,

attached as Exhibit A. DESC contracts for missile fuels and related products and services from commercial suppliers utilizing federal government contracting procedures. Id.

On August 16, 2002, the Debtor was awarded a competitively bid contract to produce N2O4 Dinitrogen tetroxide in various grades (Contract SP0600-02-D-1510). Id. at ¶ 4. N2O4 is an oxidizer that, when combined with another hazardous chemical, hydrazine, constitutes a missile and rocket propellant. Id. at ¶10.

Contract SP0600-02-D-150 is a Firm Fixed Price Contract for product as well as services.<sup>1</sup> The services required under the contract include technical escort and transportation monitoring, cylinder and rail car maintenance and repair and catastrophic emergency response. Id. at ¶ 7. The government furnishes rail cars, cylinders, drums and other technical escort team equipment under the Contract. Id.

The total estimated value of the Contract is \$25, 074,767, with the period of performance running from August of 2002 through August of 2007. Id. at ¶ 4. Pursuant to the Contract, the Debtor was paid \$3,067,600 by the government to retrofit its plant located in Yazoo City, Mississippi. Id. at ¶5.

#### **B. Users of N2O4**

The largest U.S. Government consumer of N2O4 is the United States Air Force (USAF). Both the Titan II and Titan IV Expendable Launch Vehicle (ELV) rockets, launched by the USAF, are used to carry government payloads, such as the Defense Satellite Program, the Military Strategic and Tactical Relay (MILSTAR) communications satellite, the Defense

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<sup>1</sup> It is also an FOB contract, thus the United States takes title to the product at the source of origin when the product is satisfactorily tested. Id. at ¶ 4

Meteorological Satellite, and classified Department of Defense payloads for the National Reconnaissance. *Id.* at ¶ 10. N2O4 is also required for the manufacture of Nitric Acid for the U.S. Army Lance Anti-Missile Program. *Id.*

In addition to military uses, the National Aeronautics and Space Administration (NASA) uses N2O4 to maneuver the Space Shuttle for docking and for effecting repairs to the International Space Station. *Id.* at ¶ 12.

Commercial contractors, such as the Boeing Company require N2O4 for the positioning of satellites once in orbit. *Id.* at ¶ 11. N2O4 is also integral to the payloads of Boeing's Delta Rockets that include Global Positioning Systems (GPS), which have been used for Department of Defense Warfighter Support in Operation Freedom in Afghanistan.

### **C. Current Supply of N2O4**

The Debtor is the United States government's only supplier of N2O4. *Id.* at ¶ 13. The previous government supplier, Vicksburg Chemicals, filed for bankruptcy in March 2002, and shut down its plant in May 2002. *Id.* The Debtor's facility only recently came on line in February 2003 as a result of the new government contract. *Id.* The lead time to award the contract was 4 months, with an additional 6 months required from the date of contract award until First Article Production. *Id.* In addition, the Titan and Delta programs require a hot fire test prior to use of the product, which requires an additional lead time of 4 months and an additional cost of \$435,000. *Id.* Thus, the time to contract with another company to produce N2O4 is at least 14 months. *Id.*

Based on current consumption levels, and if the Debtor produced no more N2O4, the Government will run out of the N4204 grade used for Titan & Delta launches in August of 2004.

Id. at ¶14. The N204 grade inventory used for shuttle and satellites operations and for research and development would be depleted by this month, June of 2003.<sup>2</sup> Id.

**D. Bankruptcy Filing**

On May 15, 2003, the Debtors commenced these Chapter 11 cases by filing voluntary petitions for relief under 11 U.S.C. § 101 et seq.

The Debtors continue to operate their businesses as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

When the Debtor filed for bankruptcy, DESC developed a risk mitigation strategy to accelerate production of N204 under the Contract to prevent having insufficient inventory to cover its critical requirements. Id. at ¶15. The DESC met with representatives of the Debtor on May 28 and 29th at Yahoo City, Mississippi. At that meeting, the Debtor indicated it was in agreement with the DESC's overall plan to accelerate orders and produce most of the N204 in this calendar year, rather than order over the 5 years of the Contract. Id. Such an acceleration of performance would provide greater cash flow to the Debtor.

**II. Immediate Assumption of the N204 Contract is Critical to National Defense and the U.S. Space Program and in the Best Interests of the Debtor**

The Bankruptcy Code generally authorizes a trustee to elect either to assume or to reject an executory contract. See 11 U.S.C. § 365(a). "[A]n agreement is executory if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party." In re Murexco Petroleum, Inc., 15 F.3d 60, 62 (5th Cir. 1994.)

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<sup>2</sup>The Space Shuttle has bought enough product from DESC to last until FY05.

Section 365 (d)(2) of the Code provides that the trustee, or debtor in possession, may assume or reject an executory contract at any time before confirmation of a plan. At the request of a party to such contract, however, the court may order the debtor to assume or reject within a specified time.

The determination of whether to shorten the time period for assumption or rejection is left to the broad discretion of the bankruptcy court. In re Monroe Well Service, Inc., 83 B.R. 317, 323 (Bankr. E.D. Pa. 1988). A variety of factors should be considered in determining what constitutes a reasonable time within which a debtor should assume or reject a contract, including "[t]he nature of the interests at stake, the balance of the hurt to the litigants, and the good to be achieved . . . ." In re GHR Energy Corp., 41 B.R. 668, 676 (Bankr. D. Mass.1984).<sup>3</sup>

Here, applications of those factors leads to the inexorable conclusion that the Debtor should be required to make an immediate determination of whether to assume or reject the N204 Contract. Specifically, an order requiring the Debtor to assume or reject within 15 days should be entered because: 1) continuing production of N204 is critical to both the National Defense and to the United States Space Program and the United States needs to know whether it can rely upon the Debtor continuing to supply this vital product; 2) it is in the Debtor's best interest to continue

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<sup>3</sup> In the context of extending the time period for assumption or rejection of non-residential real estate leases under § 365(d) (4), the court in In re Wedtech Corp., 72 B.R. 464, 472 (Bankr. S.D. N.Y. 1987), observed that one factor militating against extending the time for such decisions is damage to the lessor beyond the compensation available under the Bankruptcy Code. Here, as set forth above, the damage to the United States from a delayed decision in the way of harm to the national defense and to the space program from an inability to procure necessary N204 is not compensable under the Bankruptcy Code.

to perform and to receive accelerated payments on the Contract in an amount in excess of \$25 million; and 3) the Debtor does not oppose the DESC's motion.

As set forth above, N204 is critical to both national defense and the U.S. space program. N204 is used in the launch of Titan II and Titan IV ELV rockets, which are used to carry government payloads, including communications satellites, that play a crucial role in our national defense. Sharon Murphy Dec. at ¶ 10. N204 is also needed for the manufacture of Nitric Acid for the United States Army's Lance Anti-Missile Program. Id. In addition, N204 is integral to the payloads of Boeing's Delta Rockets that include Global Positioning Systems (GPS), that are used by the Department of Defense. Id. at ¶ 11.

In addition to military uses, the National Aeronautics and Space Administration (NASA) uses N204 to maneuver the Space Shuttle for docking and for effecting repairs to the International Space Station. Id. at ¶ 12. Thus, continued production of N204 is needed for the United States space program. Id.

The Debtor's plant in Yazoo City, Mississippi is the only facility currently capable of producing N204. In order for another facility to produce N204, it would have to be specially retrofitted. Such a retrofit is a time consuming and expensive process. Indeed, it would be at least 16 months before another facility could produce N204. See Murphy Dec. at ¶ 17. As set forth above, however, the government may run out of certain grades of N204 used for Titan & Delta launches prior to the time when such launches are scheduled to occur. Id. at ¶ 14. Unless N204 production by the Debtor continues, the N204 grade inventory used for shuttle and satellites operations and for research and development may also be depleted before additional N204 can be manufactured. Id. Accordingly, it is vital to the United States' national defense and



to its space program that the Debtor immediately indicate whether it intends to assume or reject the Contract at issue. *Id.* at ¶ 12. If the Debtor decided not to perform under the Contract, the United States would have to rebid the Contract immediately to establish an alternative source for N204 production. *Id.* at ¶ 17.

When faced with a similar situation, the court in In re El Paso Refinery, L.P., 220 B.R. 37 (Bankr. W.D. Tex. 1998), recognized the important national defense implications presented by a debtor's failure to perform under a contract to provide jet fuel to the DESC.<sup>4</sup> In holding that the DESC acted appropriately in lifting the stay and terminating the contract for non performance, the court observed:

The question is especially pointed under our facts. We do not here have a mere monetary default, a mere failure to make a payment due (as is so often the case with leases). [The debtor] had contracted to fulfill a requirements contract. When it did not perform, it left the DFSC with no choice but to find someone else to step in and furnish product. The fuel, after all, was for aircraft presumed to be maintained in a certain state of combat readiness, and the interests of national defense are thus implicated. The non-debtor party to this particular contract thus had no choice but to incur additional damages on a post-petition basis.

*Id.* at 43, n. 16. These same considerations are magnified here, where the product at issue is not ordinary jet fuel, but instead a specialized product vital to the nation's defense and its space program, that is only available from a single source, the Debtor.

An immediate determination of whether to assume or reject the Contract at issue, is not only in the nation's best interest, it is in the best interest of the Debtor. The N204 Contract has value to the Debtor in excess of \$25 million. In addition, due to concerns about the limited supply of N204, the DESC is prepared, upon assumption of the Contract, to accelerate its orders

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<sup>4</sup> The DESC was formerly known as the Defense Fuel Supply Center (DFSC).

and payments, such that it would buy almost all quantities of N204 need through 2007. This acceleration would enhance the cash flow of the Debtor. In recognition of the benefit to the Debtor from continued, and enhanced, payment under the Contract, the Debtor has indicated it supports the United States' Motion to Compel Assumption or Rejection of the Contract.

Wherefore, the United States request that the Court enter an Order requiring the Debtor to assume or reject Contract SP0600-02-D-1510 within 15 days of entry of the Court's Order.

Respectfully submitted,

THE UNITED STATES OF AMERICA

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Attorneys for the United States

June 12, 2003.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

In re:	)	
	)	
MISSISSIPPI CHEMICAL	)	
CORPORATION, et al.	)	CASE NO. 03-02984 WEE
	)	Chapter 11
Debtors.	)	Jointly Administered
	)	

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DECLARATION OF SHARON L. MURPHY

Pursuant to 28 U.S.C. § 1746, SHARON L. MURPHY declares as follows:

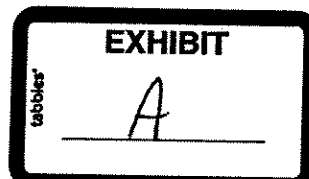
1. I am the Director of the Missile Fuels Commodity Business Unit (CBU), Defense Energy Support Center (DESC). DESC is a Department of Defense (DoD) Logistics Support Organization under the command of the Defense Logistics Agency (DLA). My organization, located at Lackland Air Force Base in San Antonio, Texas, is the DoD Integrated Materiel Manager for liquid missile/rocket propellants, chemicals, gases and cryogenics. DESC contracts for missile fuels and related products and services from commercial suppliers utilizing Federal Government contracting procedures. I also hold an Unlimited Senior Level Contracting Officer's Warrant.

2. I submit this declaration in support of the Government's Motion To Compel Debtor to Assume or Reject Executory Contract.

3. The information set forth in this declaration is based on my personal knowledge and information contained in the files and records of DESC.

The Government's Contract With MissChem Nitrogen LLC

4. MissChem Nitrogen LLC has an existing DoD contract for the production and delivery



of dinitrogen tetroxide, more commonly known as  $N_2O_4$ , Contract Number SP0600-02-D-1510 with a total estimated value of \$25,074,767. This contract was competitively awarded on August 16, 2002 and has a performance period of five years through August 15, 2007. MissChem Nitrogen LLC had both the highest technical rating and the lowest price. It is a requirements-type contract that is rated under the Defense Production Act. The contract is FOB origin which means that the Government takes title to the product when it is inspected and accepted at the MissChem Nitrogen LLC facility. A copy of the Contract is annexed hereto as Exhibit A.

5. The Contract requires that DESC pay MissChem Nitrogen LLC the cost of all plant retrofit costs of \$3,067,600 after First Article approval by the contracting officer. The First Article was approved in January 03 and DESC made this payment.

6. The Contract provides for various grades of  $N_2O_4$  such as NTO, MON-1, MON-3, MON-10, AND MON-25 (MON-1, -3, and -10 in bulk and cylinder). MON stands for Mixed Oxides of Nitrogen. Nitric oxide (NO) is a colorless gas at standard temperature and pressure. Both the liquid and the solid are blue. Low concentrations of NO (1%-3%) in nitrogen tetroxide inhibits stress corrosion cracking in storage vessels. Larger concentrations (10% – 25%) of NO in nitrogen tetroxide depresses the freezing point of the oxidizer. Solutions are called mixed oxides of nitrogen (MON), and have been used as oxidizers for liquid-rocket engines. Various concentrations have been considered. However, the high vapor pressure of MON limits the concentration of NO in  $N_2O_4$  to about 30 per cent.

7. The Contract also requires services such as Technical Escort and Transportation monitoring, Cylinder and Rail Car maintenance and repair, Emergency response Exercise support, and catastrophic emergency response. DESC provides Government Furnished

Equipment under this contract to include rail cars, cylinders, drums and other technical escort team equipment. A spreadsheet list of all this equipment is attached as Exhibit B.

8. In addition to a fixed price per pound of product ordered, DESC pays MissChem Nitrogen LLC \$290,000.00 per month in the form of a facility fee. This facility fee covers all contract costs except the product's marginal cost of raw materials and guarantees production availability for all the U.S. Government's requirements for  $\text{N}_2\text{O}_4$ . The monthly facility fee is paid regardless of whether the Government places an order or not, in order to ensure that the facility is maintained in a state of readiness.

9. MissChem Nitrogen LLC's contract also includes the requirement for a Highway Escort Team, which travels with the Government-provided bulk transporter in case of an accident, leak, or spill of product during transit over our nation's highways. The Escort Team also supports DESC's Emergency Response Plan, a requirement for our exemption from the Department of Transportation that allows bulk shipment of this hazardous chemical over the U.S. highways. All members of the Escort Team are also MissChem Nitrogen LLC production plant employees.

#### The Importance of Dinitrogen Tetroxide to National Defense

10.  $\text{N}_2\text{O}_4$  is an oxidizer that is used in conjunction with a fuel such as hydrazine as a missile and rocket propellant. Currently, the largest U.S. Government consumer of  $\text{N}_2\text{O}_4$  is the United States Air Force (USAF). Both the Titan II and Titan IV Expendable Launch Vehicle (ELV) rockets, launched by the USAF, are used to carry government payloads, such as the Defense Satellite Program, the Military Strategic and Tactical Relay (MILSTAR) communications satellite, the Defense Meteorological Satellite, and classified DoD payloads for the National Reconnaissance Office.

11. Commercial contractors, such as the Boeing Company ("Boeing"), are also authorized to receive product under MissChem Nitrogen LLC's Government contract pursuant to the Space Launch Act, and require  $\text{N}_2\text{O}_4$  for the positioning of satellites once in orbit. In addition, the payloads of Boeing's Delta Rockets include Global Positioning Systems (GPS), which uses  $\text{N}_2\text{O}_4$ , that has been integral to DoD Warfighter Support in Operation Enduring Freedom in Afghanistan.

12. Lastly, DESC also buys  $\text{N}_2\text{O}_4$  for Federal Civilian Agencies, most notably the National Aeronautics and Space Administration (NASA). NASA uses  $\text{N}_2\text{O}_4$  to maneuver the Space Shuttle for docking as well as effecting repairs to the International Space Station.  $\text{N}_2\text{O}_4$ , which is produced by MissChem Nitrogen LLC to strict military specification, is critical to both National Defense and the U.S. Space Program.

13. MissChem Nitrogen LLC is the U.S. Government's only supplier of  $\text{N}_2\text{O}_4$ . The previous government supplier, Vicksburg Chemicals, filed for bankruptcy in March 2002, and shut down its plant in May 2002. The MissChem facility only recently came on line in February 2003 as a result of the new government contract. The lead time to award the contract was 4 months. The lead time from the date of contract award until First Article Production was 6 months. In addition, even though the product must meet the government specification, the Titan and Delta programs require hot fire testing prior to use of the product. This requires additional lead time of 4 months and an additional cost of \$435,000. Thus, the time to contract with another company to produce  $\text{N}_2\text{O}_4$  is at least 14 months.

14. Based on current consumption levels, and if MissChem Nitrogen LLC produced no additional  $\text{N}_2\text{O}_4$ , the Government will run out of MON-1 (used for Titan & Delta launches) in Aug 04. The DESC MON-3 (Space Shuttle, satellites and R&D) inventory would be depleted in

June 03. NASA has bought enough product from DESC for the Space Shuttle to last until FY05.

Government Plan to Accelerate Orders Under the MissChem Nitrogen LLC Contract

15. When MissChem Nitrogen LLC filed for Chapter 11 on May 15, 2003, DESC developed a risk mitigation strategy to accelerate production of  $N_2O_4$  under the Contract in order to have sufficient inventory to cover its critical customer requirements. DESC met with MissChem Nitrogen LLC on May 28 and 29<sup>th</sup> at the Yazoo City, Mississippi facility to discuss this plan. MissChem Nitrogen LLC was in agreement with the overall plan to accelerate orders and produce most of the  $N_2O_4$  required under the entire contract during this calendar year, rather than order over the 5 years of the Contract.

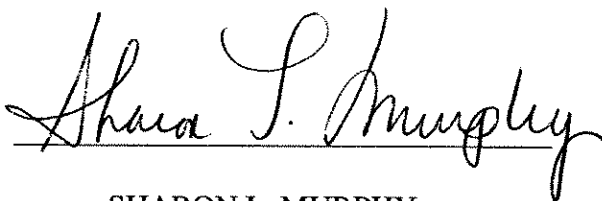
16. DESC has refined the plan and now will order 966,000 pounds of  $N_2O_4$  (total for two grades, MON-3 and MON-1). This would take 5 months to produce at an estimated rate of 6,400 pounds per day. The contract price for this product is estimated at \$1.2 million. DESC also will seek to store this product at the MissChem Nitrogen LLC facility. After the production of the product, MissChem Nitrogen LLC will be performing other services on an as needed basis such as filling conveyances, performing laboratory analyses, shipping product, and providing technical escort services for bulk shipments. MissChem Nitrogen LLC will continue to receive the monthly maintenance fee under the contract for maintaining the facility in a state of readiness to produce more product, if required by the government.

17. It is imperative that DESC know whether the Debtor will continue to perform the Contract since there is a lead time of at least 14 months before another plant would be operational. If the Debtor is not willing to continue performance of the contract, DESC will immediately need to solicit for another Contract in order to assure adequate supplies of  $N_2O_4$ .

I declare under penalty of perjury that the information contained in this declaration is true and correct.

Dated: San Antonio, Texas

June 9, 2003

A handwritten signature in cursive script, reading "Sharon L. Murphy", written over a horizontal line.

SHARON L. MURPHY

7/13/03 10:00 AM

7/13/03 10:00 AM

7/13/03 10:00 AM



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

In re:

MISSISSIPPI CHEMICAL  
CORPORATION, et al.

Debtors.

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)  
)  
)  
)  
)  
)

CASE NO. 03-02984 WEE  
Chapter 11  
Jointly Administered

**ORDER**

This matter is before the Court on the Motion of the United States to Compel MissChem Nitrogen LLC (Debtor), to Assume or Reject its contract for production and storage of dinitrogen tetroxide (N2O4) with the government.

The Court has reviewed the Motion and all objections filed. Having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief herein granted;

**IT IS HEREBY ORDERED THAT:**

1. The Motion is **GRANTED**:
2. The Debtor is hereby ordered to assume or reject the Contract within 15 days of entry of this Order.

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

DATED: \_\_\_\_\_, 2003

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 12th day of June, 2003, a true and correct copy of the United States' Motion and Memorandum in Support of Motion to Compel Assumption or Rejection of Contract, and proposed Order was sent by United States First-Class Mail, postage prepaid, to the following:

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