

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

IN RE	)	<b>Case No. 04 B 02221</b>
	)	<b>Chapter 11</b>
WICKES, INC.,	)	<b>Hon. Bruce W. Black</b>
	)	
<u>Debtor.</u>	)	
	)	
BRADCO SUPPLY CORPORATION,	)	
	)	
Movant,	)	
	)	
Vs.	)	
	)	
CAPITAL DISTRICT COOPERATIVE,	)	
INC.,	)	<b>Hearing Date: February 11, 2009</b>
	)	<b>Hearing Time: 9:15 a.m.</b>
Respondent.	)	<b>Objection Deadline: February 6, 2009</b>

**MOTION FOR THE ISSUANCE OF AN ORDER REQUIRING  
CAPITAL DISTRICT COOPERATIVE, INC. TO SHOW CAUSE WHY IT SHOULD  
NOT BE HELD IN CIVIL CONTEMPT OF THIS COURT**

COMES NOW Bradco Supply Corporation ("Bradco") pursuant to Fed. R. Bankr. P. 9020 and Local Bankruptcy Rule 9020-1 and requests that this Court issue an order requiring Capital District Cooperative, Inc. ("CDC") to show cause why CDC should not be held in civil contempt of this Court for CDC's intentional violation of this Court's *Order (I) Approving Asset Purchase Agreement; (II) Authorizing Sale Of Certain Of Debtors' Assets Free And Clear Of Liens, Claims, Encumbrances, And Interests To Bradco Supply Corporation; And (III) Authorizing Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases* [Docket No. 583] (the "Sale Order"), and upon an hearing thereon, to enter a finding of civil contempt against CDC, which contempt may only be purged by CDC's compliance with the relief requested hereafter. In support hereof, Bradco states the following:

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(M) and (N). Venue is proper pursuant to 28 U.S.C. 1409.

## **I. BACKGROUND**

### **A. Lease Agreement between Capital District Cooperative, Inc. and Wickes, Inc.**

2. On June 1, 2003, CDC entered into a lease agreement (the “Lease Agreement”) with Wickes, Inc. (“Wickes”) for Wickes to possess real property located at 391 Broadway, Menands, New York (the “Premises”). A true and accurate copy of the Lease Agreement is attached to accompanying affidavit as **Exhibit 1** and incorporated herein by this reference.

3. On information and belief, Wickes had occupied the Premises pursuant to prior lease agreements with CDC since June 1, 1973.

### **B. Bankruptcy Case of Wickes, Inc.**

4. On January 20, 2004 (the “Petition Date”), Wickes filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Court Northern District of Illinois (the “Bankruptcy Court”), which proceeding remains pending and is being administered under the caption *In re Wickes, Inc.*, Case No. 04 B 02221.

5. On June 24, 2004, Wickes (with the jointly administered, affiliate debtor GLC Division, Inc.) filed its *Debtor’s Motion For An Order: (A) Authorizing Debtor To Conduct A Sale Of Substantially All Of Its Assets; (B) Authorizing Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases; (C) Setting Dates For Sale And Hearing On Sale; (D) Approving Form of Notice; And (E) Authorizing Debtor To Enter Into “Stalking Horse” Agreements For The Sale Of Certain Assets* [Docket No. 476] (the “Sale Motion”), under which Bradco was one of the proposed stalking horse purchasers of certain assets of Wickes including

the Wickes operations located in Menard, New York, which included an assumption and assignment to Bradco of the Lease Agreement.

6. On June 28, 2004, the Bankruptcy Court entered its *Order: (A) Authorizing Debtor To Conduct A Sale Of Substantially All Of Its Assets; (B) Authorizing Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases; (C) Setting Dates For Sale And Hearing On Sale; (D) Approving Form of Notice; And (E) Authorizing Debtor To Enter Into "Stalking Horse" Agreements For The Sale Of Certain Assets* [Docket No. 484] (the "Sale Procedure Order") granting the Sale Motion and authorizing Wickes to conduct the sale of the assets, including assignment of certain designated contracts.

7. The Sale Procedure Order provided for a cure of defaults under executory contracts and unexpired leases that were to be assumed and assigned in connection with the sale. To the extent that any non-debtor party to an executory contract, such as CDC, did not object to the proposed assumption and assignment the executory contract, "the non-Debtor party to such Executory Contract shall only be entitled to recover as its cure costs that amount listed in the 365 Notice." Sale Procedure Order, p. 4.

8. On July 7, 2004, Wickes filed its *Second Notice of Potential Assumption and Assignment of Certain Contracts and Unexpired Leases* [Docket No. 518] (the "Assignment Notice"), which references the Lease Agreement and provided notice to CDC of the cure amount being proposed for all pre-closing liabilities under the Lease Agreement. The Assignment Notice provided for a cure amount of \$3,147.79 for CDC and instructed CDC of its opportunity to object and to demand additional monetary payment for cure of defaults existing under the Lease Agreement. CDC did not object to the assumption of the Lease Agreement by Wickes or

the assignment of the Lease Agreement to Bradco. CDC did not object to the proposed cure amount for the assumption of the Lease Agreement by Wickes.

9. On July 22, 2004, the Bankruptcy Court held a final hearing to approve the sale pursuant to the Sale Motion, and on July 24, 2004, the Bankruptcy Court entered its Sale Order, by which the Bankruptcy Court approved the assumption by Wickes and assignment of the Lease Agreement from Wickes to Bradco. CDC did not appeal from the Sale Order.

10. In accordance with the provisions of 11 U.S.C. § 365, the Sale Order required Wickes to cure any “default, breach or claim or pecuniary loss, or condition to assignment, arising under or related to the Designated Executory Contracts existing as of the Closing on the Sale of the Assets”. Sale Order, ¶18. On information and belief, Wickes did cure any default, breach or claim or pecuniary loss, or condition to assignment pursuant to the cure procedures approved by the Bankruptcy Court.

11. Bradco only assumed the liabilities of Wickes under the Lease Agreement arising “post closing under the Designated Executory Contract”. Sale Order, ¶17.

12. Because all defaults or breaches arising under or related to the Lease Agreement existing as of the closing were cured by Wickes, the Sale Order provided “all non-Debtor parties to the Designated Executory Contracts are forever ***barred and enjoined*** from ***raising or asserting*** against the Purchaser any assignment fee, default, breach or claim or pecuniary loss, or condition to assignment, arising under or related to the Designated Executory Contracts existing as of the Closing on the Sale of the Assets.” Sale Order, ¶18 (emphasis added).

13. The Bankruptcy Court in its Sale Order enjoined CDC from asserting the very claims that the CDC appears to raise and assert in its Complaint against Bradco in that CDC’s Complaint provides neither a description of the nature of the alleged damages to the Premises

nor a means to determine a time line as to when the damages are alleged to have occurred. The CDC has already been compensated for any pecuniary loss existing prior to July 26, 2004 under the Bankruptcy Court approved cure.

14. Under the terms of the Sale Order, the Bankruptcy Court expressly reserved jurisdiction to “interpret, implement, and enforce the provisions of this Sale Order”.

15. On July 26, 2004, Wickes and Bradco entered into a certain Assignment of Leases agreement pursuant to the Purchase Agreement approved by Bankruptcy Court in the Sale Order, which Assignment of Leases provided that Bradco assumed Wickes’ “duties, obligations and liabilities (collectively, “obligations”) under the [Lease Agreement] . . . *accruing from after the date hereof.*” Assignment of Lease, §2 (emphasis added). A true and accurate copy of the Assignment of Leases is attached to accompanying affidavit as **Exhibit 2** and is incorporated herein by this reference.

16. On December 7, 2007, Wickes filed its *Modified First Amended Joint Plan of Liquidation of Wickes Inc. and Official Committee of Unsecured Creditors Dated December, 2007* [Docket No. 3771] (the “Plan”).

17. On December 12, 2007, the Bankruptcy Court confirmed the Plan and entered its *Order Confirming Debtors’ Modified First Amended Joint Plan of Liquidation* [Docket No. 3801] (the “Confirmation Order”).

18. Although Wickes’ Plan has been confirmed, the Bankruptcy Court has not entered a Final Decree in the Bankruptcy Case. Accordingly, Bankruptcy Case remains pending and open. The Plan expressly retains jurisdiction for the Bankruptcy Court to “enforce all orders, judgments, injunctions, releases, exculpations, indemnifications and rulings entered in connection with the Chapter 11 Case”. Plan, p. 30, §9.1(e).

**C. CDC's Attempt To Pursue Bradco for Liabilities in State Court that are Barred by the Bankruptcy Court's Order**

19. On or about December 3, 2008, CDC filed a Complaint against Bradco (the "Complaint") in the Supreme Court of the State of New York for the County of Albany (the "State Court"), designated Index No. 9919-08 by the Clerk of the State Court (the "State Court Action"). A true and accurate copy of the Complaint is attached to accompanying affidavit as **Exhibit 3** and is expressly incorporated herein by reference.

20. The above-described State Court Action is a civil action attempting to allege four counts that appear to be generally in the nature of (1) breach the assigned Lease Agreement by failing to maintain and repair the premises; (2) fraudulent misrepresentation related to the assignment Lease Agreement; (3) negligent misrepresentation relating to entering into an agreement with Wickes for assignment of the Lease Agreement; and (4) permissive waste of the premises occupied pursuant to the assigned Lease Agreement. Each count seeks damages in excess of \$1,000,000.00 and appears to seek damages from Bradco that are barred by the Bankruptcy Court's order or constitutes a collateral attack upon the validity of the orders of the the Bankruptcy Court approving the assignment transaction.

21. Despite the fact that CDC has been enjoined by the Bankruptcy Court from pursuing any claims accruing prior to July 26, 2004, CDC initiated and pursued these alleged causes of action against Bradco in the State Court. The raising and asserting of these claims constitute a clear and direct violation of Sale Order and injunction imposed by the Bankruptcy Court.

#### **D. Removal of CDC's Alleged Causes of Action Against Bradco**

22. Bradco filed a *Notice of Removal* with United States District Court for the Northern District of New York ("N.D.N.Y.") under the provisions of 28 U.S.C. §§ 1441 and 1452. Pursuant to this Notice of Removal, Bradco has removed all of the alleged causes of action asserted by CDC against Bradco in its Complaint to the N.D.N.Y.

23. Bradco is filing *Defendant Bradco Supply Corporation, Inc.'s Motion for Transfer of Venue* in the N.D.N.Y., requesting that the N.D.N.Y. transfer venue of the removed matter to this Bankruptcy Court.

#### **II. GROUNDS FOR CONTEMPT ORDER**

24. Because CDC has failed to comply with this Court's clear Sale Order, coercive civil contempt penalties are appropriate in this case. On finding contempt this Court may enter monetary sanctions (A) to compensate Bradco for any damage suffered by Bradco as a result of CDC's contempt of the Sale Order and (B) to compel CDC into compliance with the Sale Order. Feltner v. Title Search Co., 283 F.3d 838, 841 (7th Cir. 2002) ("Contempt proceedings are generally classified into two categories, coercive and remedial. Coercive sanctions are used to induce compliance with court orders in the future, while remedial sanctions compensate an aggrieved party for losses sustained for past disobedience of a court's order.") (citations omitted).

25. In order to pursue contempt, Bradco has the burden of proving the following elements "by clear and convincing evidence: (1) the [o]rder sets forth an unambiguous command; (2) [contemnor] violated that command; (3) [contemnor]'s violation was significant, meaning it did not substantially comply with the [o]rder; and (4) [contemnor] failed to take steps to reasonable and diligently comply with the [o]rder." Prima Tek II, L.L.C. v. Klerk's Plastic Industries, B.V., 525 F.3d 533, 542 (7th Cir. 2008) (citations omitted).

26. To hold CDC in civil contempt, the court "must be able to point to a decree from the court which sets forth in specific detail an unequivocal command which the party in contempt violated." Jones v. Lincoln Elec. Co., 188 F.3d 709, 738 (7th Cir.1999), see also Feltner, 283 F.3d at 841 (citing Ferrell v. Pierce, Jr., 785 F.2d 1372, 1378 (7th Cir. 1986). This Court's Sale Order provides as follows:

[A]ll non-Debtor parties to the Designated Executory Contracts are forever barred and enjoined from raising or asserting against the Purchaser any assignment fee, default, breach or claim or pecuniary loss, or condition to assignment, arising under or related to the Designated Executory Contracts existing as of the Closing on the Sale of the Assets.

¶18 (emphasis added).

27. This is clearly an unequivocal command of the this Court prohibiting CDC from pursuing Bradco for the liabilities under the Lease Agreement accruing prior to the assignment of the Lease Agreement. In assuming the Lease Agreement, Wickes cured all defaults, breaches, claims or pecuniary losses arising under or related to the Lease Agreement at the time of closing following the procedures proposed by Wickes and approved by this Court. Wickes then assigned the Lease Agreement to Bradco, with Bradco assuming only the liabilities under the Lease Agreement arising thereafter. The Court entered this clear and unequivocal command to the non-debtor parties of the assigned agreements, including CDC, to prevent the non-debtor parties from seeking damages under the lease against the assignee Bradco because Wickes has already paid CDC for those damages. There is nothing ambiguous about this Court's Sale Order.

28. CDC violated this Court's unequivocal command by raising and asserting claims against Bradco for damages that occurred prior to the assignment of the Lease Agreement in its State Court Action (which has been removed to the N.D.N.Y.). The Complaint attempts to allege (1) breach the assigned Lease Agreement by failing to maintain and repair the premises;



(2) fraudulent misrepresentation related to the assignment Lease Agreement; (3) negligent misrepresentation relating to entering into an agreement with Wickes for assignment of the Lease Agreement; and (4) permissive waste of the premises occupied pursuant to the assigned Lease Agreement.

29. The CDC has made the allegations in its Complaint as seeking damages as a result of Bradco's delivery of possession of the premises after Bradco completed the lease term. By these allegations, CDC makes no distinction regarding the timeframe within which the alleged damages occurred and therefore is seeking to hold Bradco liable for damages, if any, that occurred prior to the assignment of the Lease Agreement to Bradco. This is directly in violation of this Court's Sale Order prohibiting such proceedings.

30. The actions taken by CDC in violating the Sale Order are significant in that Wickes was in possession of the Premises under the Lease Agreement and prior lease agreements for thirty (30) years prior to the assignment of the Lease Agreement. CDC does not even make the slightest attempt to distinguish in its Complaint between damage to the Premises that occurred prior to the assignment and those damages to the Premises that may have occurred after the assignment of the Lease Agreement. CDC has intentionally violated the Sale Order by taking direct actions in violation of the Sale Order and to collaterally attack the Sale Order to which CDC made no objection. Based on the allegations in its Complaint, CDC did not take any steps to reasonably and diligently comply with the Sale Order

31. The affidavit of Michael L. Weinberger is being submitted herewith in support of the allegations contained herein and the damages suffered by Bradco and is incorporated herein by this reference.

32. A proposed order requiring CDC to show cause why it should not be held in civil contempt of court for its intentional violation of the Sale Order is being submitted herewith in the form of **Exhibit A**.

WHEREFORE, Movant Bradco Supply Corporation respectfully requests that this Court enter an order

(A) Requiring Capital District Cooperative, Inc. to show cause within ten (10) days of service upon it of said show cause order by Capital District Cooperative, Inc. should not be held in contempt of this Court for Capital District Cooperative, Inc.'s intentional violation of this Court's Sale Order;

(B) Compelling Capital District Cooperative, Inc. to cease raising or asserting in its Complaint claims and causes of action against Bradco Supply Corporation for any assignment fee, default, breach or claim or pecuniary loss, or condition to assignment, arising under or related to the Lease Agreement existing as of the closing on the sale of assets within ten (10) days following finding Capital District Cooperative, Inc. in contempt of this Court;

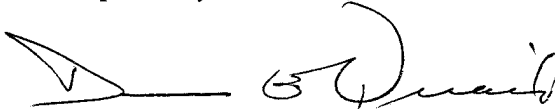
(C) Imposing a civil monetary sanction on a daily basis in an amount deemed appropriate by this Court to compel compliance with the Sale Order payable to Bradco Supply Corporation, in the event that Capital District Cooperative, Inc. fails to comply with the Sale Order within ten (10) days following finding Capital District Cooperative, Inc. in contempt of this Court;

(D) Awarding damages to Bradco Supply Corporation in the amount of Bradco Supply Corporation's costs and attorneys' fees incurred by Bradco Supply Corporation in defending the claims and causes of action against Bradco Supply Corporation contained in the Complaint for any assignment fee, default, breach or claim or pecuniary loss, or condition to

assignment, arising under or related to the Lease Agreement existing as of the closing on the sale of assets and incurred by Bradco Supply Corporation in bring this Motion before this Court; and

(E) Granting such other and further relief as it deems just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis E. Quaid", is written over a horizontal line.

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

IN RE	)	<b>Case No. 04 B 02221</b>
	)	<b>Chapter 11</b>
WICKES, INC.,	)	<b>Hon. Bruce W. Black</b>
	)	
<u>Debtor.</u>	)	
	)	
<b>BRADCO SUPPLY CORPORATION,</b>	)	
	)	
<b>Movant,</b>	)	
	)	
vs.	)	
	)	
<b>CAPITAL DISTRICT COOPERATIVE,</b>	)	
<b>INC.,</b>	)	
	)	
<b>Respondent.</b>	)	

**ORDER REQUIRING CAPITAL DISTRICT COOPERATIVE, INC.  
TO SHOW CAUSE WHY IT SHOULD  
NOT BE HELD IN CIVIL CONTEMPT OF THIS COURT**

THIS CAUSE coming to be heard on the Motion for the Issuance of an Order Requiring Capital District Cooperative, Inc. to Show Cause Why it Should Not be Held in Civil Contempt of this Court (the "Motion") filed by Bradco Supply Corporation ("Bradco") requiring Capital District Cooperative, Inc. ("CDC") to show cause why CDC should not be held in civil contempt of this Court for CDC's intentional violation of this Court's *Order (I) Approving Asset Purchase Agreement; (II) Authorizing Sale Of Certain Of Debtors' Assets Free And Clear Of Liens, Claims, Encumbrances, And Interests To Bradco Supply Corporation; And (III) Authorizing Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases* [Docket No. 583] (the "Sale Order") by the filing of a civil action against Bradco in the Supreme Court of the State of New York for the County of Albany, after due notice and an opportunity for hearing, the



Court finding that it has jurisdiction over the parties and subject matter and that the subject matter of the Motion constitutes a core proceeding,

Wherefore, It Is Ordered as Follows:

Capital District Cooperative, Inc. is ordered to appear before this Court and to show cause why it should not be held in contempt of this Court for its violation of this Court's Sale Order by the filing of a civil action against Bradco Supply Corporation in the Supreme Court of the State of New York for the County of Albany raising or asserting against Bradco Supply Corporation claims for defaults, damages and pecuniary loss arising under or related to the assigned Lease Agreement that existed as of assignment of the Lease Agreement on

\_\_\_\_\_, 2009 at \_\_\_\_\_ .M.

ENTERED:

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The Honorable Bruce W. Black  
United States Bankruptcy Judge

This Order was prepared by:  
Dennis E. Quaid, Esq. (#0226012)  
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