

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

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

**AFFIDAVIT OF MICHAEL L. WEINBERGER IN SUPPORT OF  
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 Michael L. Weinberger, and in support of the *Motion for 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, states as follows:

1. I am Michael L. Weinberger. I am over twenty-one years of age and, except for those statements made on information and belief, I have personal knowledge of the matters set forth in this Affidavit. If called upon to do so, I could testify to the matters stated in this Affidavit.
2. I am the General Counsel and Corporate Secretary of Bradco Supply Corporation.

3. On information and belief, on June 1, 2003, Capital District Cooperative, Inc. ("CDC") entered into a lease agreement (the "Lease Agreement") with Wickes, Inc. ("Wickes") for Wickes to lease real property located at 391 Broadway, Menands, New York (the "Premises"). A true and accurate copy of the Lease Agreement is attached hereto as Exhibit 1 and incorporated herein by this reference.

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

5. On information and belief, 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. CDC did not object to the assumption of the Lease Agreement by Wickes or the assignment of the Lease Agreement to Bradco.

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

12. 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.

13. CDC did not appeal from the Sale Order.

14. 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.

15. On information and belief, Wickes did cure and compensate CDC for every default, breach or claim or pecuniary loss, or condition to assignment pursuant to the cure procedures approved by the Bankruptcy Court.

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

17. 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.

18. 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.

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

20. 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 hereto as Exhibit 2 and is incorporated herein by this reference.

21. On information and belief, 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”).

22. On information and belief, 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”).

23. On information and belief, 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).

24. 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 hereto as Exhibit 3 and is expressly incorporated herein by reference.

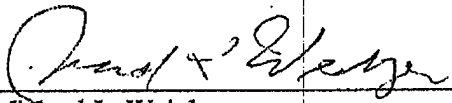
25. The above-described State Court Action is a civil action attempting to allege four counts that appear to be generally in the nature of (1) breach the assigned Lease Agreement by failing to maintain and repair the premises; (2) fraudulent misrepresentation related to the assignment Lease Agreement; (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 Sale Order.

26. 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.

27. Bradco will also file a *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.

28. Bradco has been damaged and will continue to be damaged by CDC’s actions because Bradco incurred the fees, costs and expenses of defending against the assertion of claims against Bradco that are expressly enjoined by the Sale Order in the State Court Action and the fees, costs and expenses of bringing this Motion.

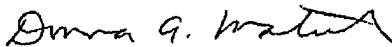
I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING  
STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND  
BELIEF AND THAT THIS AFFIDAVIT IS EXECUTED THIS 15 DAY OF JANUARY,  
2009.

  
\_\_\_\_\_  
Michael L. Weinberger  
General Counsel and Corporate Secretary  
Bradco Supply Corporation

STATE OF New Jersey )  
COUNTY OF Middlesex ) SS.

On this 15 day of January, 2009, before me appeared Michael L. Weinberger, to me  
personally known, who being by me duly sworn, did state that the statements made herein are  
true to the best of his knowledge, information and belief.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix my official seal  
in the County and State aforesaid, the date and year written above.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:

Donna A. Matulewicz  
A Notary Public of New Jersey  
commission expires November 15, 2010

## LEASE AGREEMENT

This Lease Agreement is made and entered into as of the 1<sup>st</sup> day of June, 2003 ("Lease"), by and between CAPITAL DISTRICT COOPERATIVE, INC., a New York corporation, with its principal place of business located at 381 Broadway, Menands, New York 12204, Village of Menands, County of Albany, State of New York ("Landlord"), and WICKES INC., a Delaware corporation, with its principal place of business located at 706 Deerpath Drive, Vernon Hills, Illinois 60061 ("Tenant").

### W I T N E S S E T H :

**WHEREAS**, Landlord and The Wickes Corporation had an existing relationship of landlord and tenant with regard to the premises pursuant to a lease agreement dated June 1, 1973, the term of which is scheduled to expire on May 31, 2003;

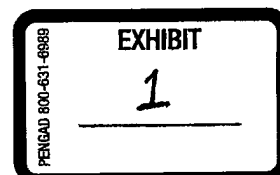
**WHEREAS**, pursuant to said lease agreement title to all buildings and improvements has vested with Landlord; and

**WHEREAS**, Landlord and Tenant desire to enter into this new lease agreement with regard to the premises, as of June 1, 2003.

**NOW, THEREFORE**, in consideration of the foregoing premises and the mutual covenants and promises set forth herein, Landlord hereby demises and leases to Tenant, and Tenant takes and leases from Landlord, the premises hereinafter described upon the following terms and conditions:

The premises ("Premises") let to Tenant hereunder shall consist of all of the premises situated in the Village of Menands, County of Albany, State of New York, particularly described in the annexed Exhibit "A". The Premises let are strictly "as is" and without warranty of any kind or nature. The initial term of this Lease shall commence on June 1, 2003 and shall expire at midnight on May 31, 2008, unless otherwise terminated or extended by the parties as set forth herein. Tenant's occupancy hereunder may be extended beyond the initial term, at the election of Tenant, for three (3) five (5) year terms. Tenant may exercise any option to renew, by giving Landlord written notice of its intention to do so, no less than six (6) months before the expiration of the then existing term. Tenant may not exercise such option if it is in default of any of the terms of this Agreement without the prior written consent of Landlord.

1. That the Tenant shall pay the annual rent of Forty-eight Thousand and 00/100 (\$48,000.00) Dollars, said rent to be paid in equal monthly payments in advance on the 1st day of each and every month during the term aforesaid, as follows: Four Thousand and 00/100 (\$4,000.00) Dollars on June 1, 2003 and Four Thousand and 00/100 (\$4,000.00) Dollars per month on the first day of each consecutive month thereafter during the term of this lease agreement or as it may be extended.





In the event Tenant shall elect to exercise any future option(s) then the monthly and annual rent shall be as determined as follows:

Minimum monthly rental during the second five year term, from June 1, 2008 through May 31, 2013, shall be Fifty-two Thousand Eight Hundred and 00/100 (\$52,800.00) Dollars, said rent to be paid in equal monthly payments in advance on the 1<sup>st</sup> day of each and every month during the term aforesaid, as follows: Four Thousand Four Hundred and 00/100 (\$4,400.00) Dollars on June 1, 2008 and Four Thousand Four Hundred and 00/100 (\$4,400.00) Dollars per month on the first day of each consecutive month thereafter during the second five year term of this lease agreement.

Minimum monthly rental during the third five year term, from June 1, 2013 through May 31, 2018, shall be Fifty-seven Thousand Six Hundred and 00/100 (\$57,600.00) Dollars, said rent to be paid in equal monthly payments in advance on the 1<sup>st</sup> day of each and every month during the term aforesaid, as follows: Four Thousand Eight Hundred and 00/100 (\$4,800.00) Dollars on June 1, 2013 and Four Thousand Eight Hundred and 00/100 (\$4,800.00) Dollars per month on the first day of each consecutive month thereafter during the third five year term of this lease agreement.

Minimum monthly rental during the fourth five year term, from June 1, 2018 through May 31, 2023, shall be Sixty-two Thousand Four Hundred and 00/100 (\$62,400.00) Dollars, said rent to be paid in equal monthly payments in advance on the 1<sup>st</sup> day of each and every month during the term aforesaid, as follows: Five Thousand Two Hundred and 00/100 (\$5,200.00) Dollars on June 1, 2018 and Five Thousand Two Hundred and 00/100 (\$5,200.00) Dollars per month on the first day of each consecutive month thereafter during the third five year term of this lease agreement.

The foregoing minimum monthly rental rate shall be a net amount excluding all utilities, all insurances, all property taxes, levies, assessments, and building maintenance (including but not limited to all structural repairs, roof repairs, snow removal, grounds care and maintenance of all mechanical systems), which shall be Tenant's sole responsibility. Such rental shall be prepaid on a monthly basis on or before the first day of each month of the term of this Lease.

Tenant shall promptly pay all charges for electricity, water, gas, telephone service, sewerage service, and other utilities furnished to the Premises. Landlord may furnish one or more utility services to Tenant. In such event, Tenant shall purchase the use of all such services and pay on demand as additional rent the rates established for them by Landlord. The rates shall not exceed those that local public utility companies would charge for directly furnishing the same services. Landlord may at any time discontinue a service without obligation to Tenant other than to connect the Premises to the public utility furnishing such service.

Landlord shall not be liable for any interruption in utility services not furnished by it, or for interruptions in utility services furnished by it that are due to fire, accident, strike, acts of God, or other causes beyond its control or are necessary to make alterations, repairs, or improvements.

2. That the Tenant shall take good care of the premises and shall, at the Tenant's own cost and expense, make all repairs, and at the end or other expiration of the term, shall deliver up the demised premises in good order or condition, damages by the elements excepted.

3. That the Tenant shall promptly execute and comply with all reasonable rules and regulations of Landlord and all statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and Local Governments and of any and all their Departments and Bureaus applicable to said premises, for the correction, prevention, and abatement of nuisances or other grievances, in, upon, or connected with said premises during said term; and shall also promptly comply with and execute all rules, orders and regulations of the New York Board of Fire Underwriters, or any other similar body, at the Tenant's own cost and expense.

4. That the Tenant, successors, heirs, executors or administrators shall not assign this agreement, or underlet or underlease the premises, or any part thereof, or make any alterations on the premises, without the Landlord's consent in writing; or occupy, or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on account of fire, under the penalty of damages and forfeiture, and in the event of a breach thereof, the term herein shall immediately cease and determine at the option of the Landlord as if it were the expiration of the original term.

5. In the event the Premises is wholly or partially damaged or destroyed by fire or other casualty which is covered by Tenant's insurance then, at Landlord's election, either: (i) Tenant will proceed to restore the Premises to substantially the same condition existing immediately prior to such damage or destruction, or (ii) Tenant will turn over the net insurance proceeds recovered by reason of the damage or destruction to Landlord, and Landlord will restore the Premises to substantially the same condition existing immediately prior to such damage or destruction.

To the extent after fire or other casualty that Tenant shall be deprived of the use and occupancy of the Premises or any portion thereof as a result of any such damage, destruction or the repair thereof, Tenant shall be relieved of the same ratable portion of the monthly rent hereunder as the amount of damaged or useless space in the Premises bears to the rentable square footage of the Premises until such time as the Premises may be restored. Landlord shall reasonably determine the amount of damaged or useless space and the square footage of the Premises referenced in the prior sentence.

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6. The said Tenant agrees that the said Landlord and the Landlord's agents and other representatives shall have the right to enter into an upon said premises, or any part thereof, at all reasonable hours for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof.

7. The Tenant also agrees to permit the Landlord or the Landlord's agents to show the premises to persons wishing to hire or purchase the same; and the Tenant further agrees that on and after the sixth month, next preceding the expiration of the term

hereby granted, the Landlord or the Landlord's agents shall have the right to place notices on the front of said premises, or any part thereof, offering the premises "To Let" or "For Sale", and the Tenant hereby agrees to permit the same to remain thereon without hindrance or molestation.

8. That if any default be made in the payment of the said rent or any part thereof, or if any default be made in the performance of any of the covenants herein contained, the Landlord or representatives may re-enter the said premises by force, summary proceedings or otherwise, and remove all persons therefrom, without being liable to prosecution therefor, and the Tenant hereby expressly waives the service of any notice in writing of intention to re-enter, and the Tenant shall pay at the same time as the rent becomes payable under the terms hereof a sum equivalent to the rent reserved herein, and the Landlord may rent the premises on behalf of the Tenant, reserving the right to rent the premises for a longer period of time than fixed in the original lease without releasing the original Tenant from any liability, applying any moneys collected, first to the expense of resuming or obtaining possession, second to restoring the premises to a rentable condition, and then to the payment of the rent and all other charges due and to become due to the Landlord, any surplus to be paid to the Tenant, who shall remain liable for any deficiency.

9. That the Tenant shall neither encumber nor obstruct the sidewalk in front of, entrance to, or halls and stairs of any commonly shared areas within the Premises, nor allow the same to be obstructed or encumbered in any manner.

10. The Tenant shall neither place, or cause or allow to be placed, any new sign or signs of any kind whatsoever at, in or about the entrance to said premises or any other part of same, except in or at such place or places as may be indicated by the Landlord and consented to by the Landlord in writing. The Tenant shall be able to replace or maintain current signs with significantly similar sign or signs without the Landlord's consent. And in case the Landlord or the Landlord's representatives shall deem it necessary to remove any such sign or signs in order to paint the said premises or the building wherein same is situated or make any other repairs, alterations or improvements in or upon said premises or building or any part thereof, the Landlord shall have the right to do so, providing the same be removed and replaced at the Landlord's expense, whenever the said repairs, alterations or improvements shall be completed.

11. That the Landlord is exempt from any and all liability for any damage or injury to person or property caused by or resulting from steam, electricity, gas, water, rain, ice or snow, or any leak or flow from or into any part of said building or from any damage or injury resulting or arising from any other cause or happening whatsoever unless said damage or injury be caused by or be due to the negligence of the Landlord.

Tenant, as a material part of the consideration to be provided to Landlord under this Lease, hereby assumes all risk of damage to property or injury to persons in or about the Premises from any cause whatsoever, except that which is caused by Landlord's negligence or the failure of Landlord to observe any of the terms and conditions of this

Lease Agreement, and subject to the foregoing exceptions, Tenant hereby waives all claims in respect thereof against Landlord. Except for claims arising out of the gross negligence or intentional misconduct of Landlord, its employees, agents, or invitees, Landlord shall have no liability for, and Tenant hereby irrevocably waives, all claims for damage to personal property sustained by it or its employees, agents, servants, invitees and customers or any other person arising out of the use, occupancy, possession or control of the Premises or any part thereof, or resulting from any accident in or about the Premises.

Tenant shall indemnify and hold harmless Landlord against and from any and all claims arising from or out of Tenant's use, occupancy, possession or control of the Premises (other than those arising from negligence of Landlord, its partners, representatives, agents or employees), or the conduct of its business, or from any activity, work, or thing done, permitted or suffered by the Tenant in or about the Premises, or arising from any act, neglect, fault or omission of the Tenant, or of its agents or employees; and from and against all costs, attorney's fees, expenses and liabilities incurred in or about such claim or any action or proceeding brought relative thereto and in case any action or proceeding be brought against Landlord by reason of any such claim, Tenant upon immediate written notice from Landlord shall defend the same at Tenant's expense by counsel, chosen by Tenant, who is reasonably acceptable to Landlord.

Landlord shall indemnify and hold harmless Tenant against and from any and all claims arising from or out of Landlord's fee interest in the Premises; Landlord's breach or failure to observe any term or condition of this Lease; or the conduct of its business, or from any activity, work, or thing done, permitted or suffered by the Landlord in or about the Premises prior to the commencement date of this Lease, or arising from any act, neglect, fault or omission of the Landlord, or of its agents or employees during the term of the Lease; and from and against all costs, attorney's fees, expenses and liabilities incurred in or about such claim or any action or proceeding brought relative thereto and in case any action or proceeding be brought against Tenant by reason of any such claim, Landlord upon immediate written notice from Tenant shall defend the same at Landlord's expense by counsel, chosen by Landlord, who is reasonably acceptable to Tenant.

The obligations of Landlord and Tenant under this Section arising by reason of any occurrence taking place during the term of this Lease shall survive the termination or expiration of this Lease for a period of one (1) year thereafter.

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12. That if default be made in any of the covenants herein contained, then it shall be lawful for the said Landlord to re-enter the said premises, and the same to have again, re-possess and enjoy. The said Tenant hereby expressly waives the service of any notice in writing of intention to re-enter.

13. That this instrument shall not be a lien against said premises in respect to any mortgages that are now on or that hereafter may be placed against said premises, and that the recording of such mortgage or mortgages shall have a preference and